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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 103.

JOSEPHINE H. THROCKMORTON AND LUKE DEVLIN, PLAINTIFFS IN ERROR,

vs.

WASHINGTON D. HOLT, WILLIAM G. STERETT, MARGARET BOWMER, AND OTHERS.

BRIEF FOR DEFENDANTS IN ERROR.

J. M. WILSON,
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Attorneys for Defendants in Error.

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IN THE

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JOSEPHINE HOLT THROCKMORTON AND LUKE DEVLIN, PLAINTIFFS IN ERROR,

vs.

WASHINGTON D. HOLT ET AL.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

On the first day of August, 1894, Joseph Holt died in the city of Washington, leaving an estate of about $180,000, all of which was personal property except his dwelling-house on the corner of C street and New Jersey avenue southeast. His nearest surviving relatives were a number of nieces and nephews, who are the defendants in error here. No will having been found, three of his nephews, Washington D. Holt, William G. Sterett, and John W. Holt, filed a petition in the supreme court of the District of Columbia, holding a special term for orphans' court business, setting forth, among

other things, his intestacy, and asking the court to proceed to administer his estate (Record, 1–3).

On the 28th of September, 1894, the National Safe Deposit, Savings and Trust Company of the District was appointed administrator of the estate (4), and that corporation immediately entered upon the performance of its duties as administrator and has continued to perform them to this day.

On the 26th day of August, 1895, there came by mail to the register of wills in Washington a sealed envelope addressed to that officer which was postmarked "Washington, D. C., August 24, 6 p. m., 1895, L" (21, 119). Upon opening this envelope the register of wills found therein a paper purporting to be a will executed by "J. Holt," dated "Feb'y 7th, 1873," to which were appended what purported to be the signatures of Ellen B. E. Sherman, U. S. Grant, and W. T. Sherman. This will gave one-half of the estate to "Lizzie Hynes" and the other half to Josephine Holt Throckmorton. On the afternoon of August 24 Josephine Holt Throckmorton, who lived in New York, passed through the city of Washington, stopping about an hour at the Baltimore and Potomac depot, which is in what is known as the northwest section of the city (116). The envelope in question was mailed between 3 and 4 o'clock, or a little earlier or a little later, on that afternoon, in a letter-box in the northwest section (119).

The real name of the other devisee was Elizabeth Hynes (90, 93). She was a relative of Judge Holt's second wife, who died about 1860, and he had been supporting her for many years. She lived in Kentucky.

Josephine Holt Throckmorton is a daughter of Major Charles B. Throckmorton, of the United States Army. In 1873 and for a long time prior thereto the relations between Judge Holt and the Throckmorton family were intimate and affectionate. Josephine was born in September, 1866 (114, 115), and was consequently about six and a half years of age at the date of the alleged will.

The executor named in the alleged will was Luke Devlin. Judge Holt was judge advocate general of the army from 1862 until 1875. From 1862 until 1869 Devlin was a messenger in the office of the judge advocate general, and during the remainder of Judge Holt's term as judge advocate general he was a clerk in that office (81, 22).

On the 20th of September, 1895, Devlin filed a petition asking the court to admit the alleged will to probate and to revoke the letters of administration theretofore granted (4, 5). On the 18th of October, 1895, Washington D. Holt and the other nephews and nieces of Judge Holt who would be the distributees of his estate if he had died intestate filed a caveat to the alleged will (6, 7). Devlin, "Lizzie Hynes," and Miss Throckmorton filed an answer to this caveat (9). On the 20th of March, 1896, the probate court framed four issues to be transmitted to the special term of the same court, sitting as a circuit court, there to be tried by a jury. These issues were whether the instrument in question had been executed by Joseph Holt as his last will and testament, whether its execution had been procured by fraud, whether it had been procured by undue influence, and whether, if he had executed it, he had revoked it (12). The trial of these issues began on the 18th day of May, 1896. The evidence at the trial was confined entirely to the first and fourth issues—that is, as to whether Holt had executed the paper as his will, and, if so, whether he had revoked it. The trial terminated June 25, 1896, the jury finding that the paper had never been executed by Joseph Holt as his last will and testament, and that "because he never executed it" he had not revoked it (13).

This verdict having been returned by the circuit court to the probate court, final judgment was entered in the probate court on the 10th of July, 1896, formally adjudging that the paper was never executed by Holt as his last will and testament and denying it probate for that reason (14). At the foot of the judgment it was noted that Devlin, "Elizabeth

Hynes," and Miss Throckmorton appealed to the Court of Appeals (15). On the 3d of August, 1896, Elizabeth Hynes withdrew her appeal (16). The one-half of the personal estate which, under the alleged will, would have gone to Miss Hynes (less a sum retained to meet possible expenses) has been distributed among the caveators, and the controversy has since involved only that one-half of the estate which the instrument in controversy purported to give to Miss Throckmorton, and Luke Devlin's possible claim to commissions as executor (17).

The Court of Appeals affirmed the judgment of the probate court (162). The opinion of the court was delivered by Mr. Justice Shepard (146 to 162), and was concurred in by the other members of the court.

Thereupon Luke Devlin and Joseph Holt Throckmorton brought the case here by writ of error.

Counsel for plaintiffs in error on the first page of their brief state that the main questions of law raised in this case have never before been presented to this court, and that those questions are of such gravity and importance that they call for the most exhaustive research of precedents and the fullest presentation of argument. Counsel then proceed to state what they conceive these two grave and important questions to be. It becomes necessary for us to state somewhat in detail the proceedings at the trial as they appear in the record here for the purpose of showing that neither of the questions referred to has arisen in this case. It will appear further on, as we think, that neither of them has arisen or been discussed in any reported case. It will be seen also that the two important questions which are really raised by the record in this case are the following:

1. When after the death of a person a paper purporting to be his last will, but dated more than twenty years before his death, comes from an unknown source, bearing marks of burning and mutilation, which are sufficient to revoke it if done by the testator with that intent—the paper having no

attestation clause, but purporting to be signed by witnesses, all of whom have long been dead—and there is no evidence to connect the paper with the testator except opinions as to the handwriting, and no evidence whatever to explain the burning and mutilation, may such will be admitted to probate?

2. In the case above suggested, if those who offer the instrument for probate are entitled to have it considered at all without connecting it with the testator and without any explanation of the burning or mutilation, must the evidence at the trial of the issue as to the genuineness of the paper be confined to opinions as to handwriting and to circumstances antedating the will; or are the relations of the supposed testator to the persons benefited by the will, on the one hand, and to those excluded by it from sharing in his estate, on the other, from the time of its date to the time of his death also admissible as tending to show that it was or was not probable that he executed the instrument and continued it in force as his will during the remainder of his life?

Neither of these questions is discussed or even stated in the brief for the plaintiffs in error. That brief is mainly devoted to the discussion of questions which are not presented by this record at all.

The trial began by the introduction of evidence of three witnesses on behalf of the caveatees tending to prove the genuineness of the three signatures which appear at the foot of the paper in controversy (20, 21). This was followed up by evidence tending to prove that the remainder of the paper, including the signature "J. Holt," is in the handwriting of Joseph Holt (21, 22, 23). It was admitted by counsel on both sides that the paper in controversy came to the office of the register of wills anonymously on the 26th of August, 1895, in the same state in which it was presented

to the jury—that is, mutilated and partly burned, and the place torn off where the seal should have been (21).

When without further evidence the instrument was offered in evidence by counsel for the caveatees, the caveators objected "on the ground that the paper was evidently separated into two parts; that it purported to be under seal, and the seal, if it ever bore one, had been torn away; that it appeared to have been burned and mutilated, and had been sent to the register of wills anonymously, and that it was incumbent upon the caveatees to explain these circumstances before the will could be read to the jury." This objection was overruled by the court (21).

The only other evidence offered by the caveatees in support of the first issue, as to which, of course, the burden of proof was upon them, was the testimony of the three persons named in the will that they never saw the paper or heard of its existence until after it had been sent to the register of wills (22).

It should be noted that the caveatees had proposed to close their case-in-chief after calling only one witness as to the handwriting of Judge Holt; that the caveators objected that it was incumbent upon the caveatees to put in all their testimony as to the establishment of the alleged will before the caveators were called upon to offer any evidence on their part; that the court sustained this contention, and that the caveatees accepted the ruling as a matter within the discretion of the court and proceeded to offer the testimony of several other witnesses as to the handwriting of the paper (22, 23).

The caveatees having closed their evidence, the caveators gave evidence by a number of witnesses familiar with the handwriting of Judge Holt tending to prove that neither the will nor the signature thereto was in his handwriting (29, 31, 47). They also offered a mass of testimony as to the relations that existed prior to February 7, 1873—the date of the paper in controversy—between Judge Holt and the

three persons named in the will, on the one hand, and his relatives, on the other. *None of this evidence was objected to.* It was conceded by counsel on both sides during the trial that any evidence that would tend to put the jury in the position of Judge Holt on the 7th of February, 1873, so that the jury might be enabled to determine as to the probability that such a will as this would have been executed by him on that day, was relevant and important. As no hint of this fact appears anywhere in the brief of the plaintiffs in error and as throughout it conveys a contrary impression, it becomes necessary for us to show the court by the record that our statement is correct.

In the direct examination of Emily Edson Briggs by the caveators as a witness in their behalf she was asked to state what she had observed as to Judge Holt's treatment of the Throckmortons and what she had heard him say about them. Thereupon counsel for the caveatees said to the court:

"We object to that *unless the time is fixed either anterior to the date of the will or contemporaneously with it.* What he may have said or thought about them in years *after* the making of the will would throw no light upon the question of its genuineness" (31).

Thereupon counsel for the caveators stated to the court that they claimed it was competent to offer evidence as to the declarations of the testator with reference to his will and the distribution of his property as tending to show his relations both with the persons named in his will and those who under the law would have taken his property if he had died intestate, and that such declarations were competent, "whether they were made before, at the time of, or after the date of the will;" whereupon counsel for the caveatees said: "Only the last proposition is in dispute" (32); and when the evidence of Mrs. Briggs had been given objection was made upon the ground that it was incompetent

upon the question of the genuineness of the will because "long subsequent in date thereto" (36).

It was then stipulated by counsel, in the presence of the court, "that any further testimony that might be offered on behalf of the caveators as to any declarations made by said Joseph Holt *after* February 7, 1873, as to his testamentary intentions," should be deemed admitted subject to the objection and exception of the caveatees (39).

So by reference to pages 49 to 54 of the record it will be seen that there was no objection to the evidence of the caveators going over the whole life of Judge Holt prior to February 7, 1873, showing his relations with his next of kin, but that when in the course of the examination of one of the caveators, Lockie Holt Iglehart, her wedding trip to Washington, in 1874, was reached, and when she was asked how Judge Holt treated her and her husband on that occasion, counsel for the caveatees objected on the ground that testimony as to the relations between the testator and his relatives *subsequent to the date of the will in controversy* was inadmissible and incompetent (54).

And as to the numerous letters from Judge Holt to his relatives which were put in evidence by the caveators, only those subsequent to February 7, 1873, were objected to, as will be seen by reference to page 61 of the record, where it is stated that "the foregoing letter and all other letters *subsequent to February* 7, 1873, and all testimony as to the relations between Joseph Holt and his relatives *subsequent* to that date" were objected to on the ground that the relations between Holt and his relatives "subsequent to the date of the will in controversy" were inadmissible and incompetent (61); and on page 84, in the seventeenth exception, it is stated that the objection is to the admission of testimony "as to the relations with Mrs. Throckmorton *after* 1873."

In the brief which was filed on behalf of the caveatees in the Court of Appeals they made no complaint in their assignments of error as to the admission of evidence of the

relations between Joseph Holt and the different parties in interest prior to February 7, 1873. Their first three assignments of error in that court cover this point, and are as follows:

"1. The court erred in admitting in evidence as competent to prove that the will in controversy was a forgery, testimony as to the declarations alleged to have been made by Joseph Holt, but not until many years *after* the making of the will in controversy, as to actual or intended dispositions of his estate inconsistent with the will in controversy, as set forth in exceptions Nos. 2, 6, and 14.

"2. The court erred in admitting in evidence as competent to prove that the will in controversy was a forgery, testimony as to alleged acts and declarations by the said Joseph Holt, but not occurring until many years *after* the making of the will in controversy, as to his then existing relations with and feelings towards certain of his relatives not named in said will, as set forth in exceptions Nos. 10, 11, 12, and 13.

"3. The court erred in admitting in evidence, as competent to prove that the will in controversy was a forgery, testimony as to alleged acts and declarations by said Holt tending to show the existence in his mind many years *after* the making of said will, but not before nor at the time thereof nor for many years thereafter, of hostile feelings towards persons nearly and remotely connected by consanguinity and affinity with persons named as beneficiaries in said will, as set forth in exceptions Nos. 4, 5, 15, 16, 17."

Until the brief on behalf of the caveatees in this court was filed there never was a suggestion made on their behalf that it was error to admit evidence as to Judge Holt's acts and declarations at any time prior to February 7, 1873, tending to show what his testamentary intentions actually were or what they probably would have been.

Again, from the beginning to the end of the brief submitted in this court on behalf of the caveatees, it seems to

be assumed that the trial court had ruled that declarations made by Judge Holt as to past facts were competent evidence to prove those facts. Several cases are cited in which it has been held that where a testator, after the date of an alleged will, had said that he had or had not made any will or had or had not made the particular will in dispute it had been held that such a declaration was not competent evidence to prove the fact of the execution or non-execution of such will; but the fact is that the counsel for the caveators during the trial did not at any time ask the court to hold, and the court did not at any time hold, that declarations of Judge Holt were competent for any such purpose. It was contended, and the court decided, that it was competent for the parties to show what were Judge Holt's testamentary intentions after the date of the will as well as before, and as to such subsequent declarations all that the court held was that they were competent for the purpose of showing what were his testamentary intentions at the time the declarations were made. Most of this evidence related to Judge Holt's conduct and declarations concerning his relatives, on the one hand, and the Throckmorton family and Miss Hynes and Devlin, on the other, but it was all admitted in connection with the evidence, pro and con, bearing directly upon the instrument in controversy to enable the jury to determine whether it was reasonable to believe that from February, 1873, till he died, in 1894, Judge Holt intended that his estate should go to the devisees named in that instrument.

As a clear understanding of this matter will of itself be a complete answer to that part of the brief on behalf of the caveatees in this court which deals with the admissibility of subsequent declarations of a testator when the issue is forgery, we proceed to refer the court to all that the record discloses bearing upon this point.

The first discussion of this subject exhibited by the record is in connection with the testimony of Mrs. Briggs, who testi-

fied that some time in 1881, when she asked Judge Holt some question about the Throckmorton family, he replied in a tone which made a great impression upon her at the time "I do not know the Throckmortons," and that some time during the administration of President Arthur, Judge Holt, at one of the President's receptions, when Major Throckmorton offered him his hand, refused to take it and turned his back on the Major (31, 36).

It will be seen that this testimony related exclusively to the feelings of Judge Holt toward Major Throckmorton and his family *at the time*, and could not by any possibility have any relation to any past transaction, except that it might be inferred from Judge Holt's feelings toward the Thockmortons there had been some antecedent trouble between them.

At the outset of the discussion as to Mrs. Briggs' evidence about what Judge Holt said to her, counsel for the caveators stated that they deemed it competent "as evidence of the declaration [intention] of the testator with reference to his will and the distribution of his property, *as tending to show his relations both with the persons named in his will and those who would under the law take his property if he had died intestate*" (32). In the course of the discussion the court said that the object of the testimony, as the court understood it, was "*by showing the relations of the parties*" to indicate that it was not Judge Holt's intention at the time of his decease that his property should go in the way in which the paper in controversy disposed of it (32). And further on in the same opinion the court said:

"Evidence of the declarations of a testator that would be either in favor of the will and its provisions, or against it; evidence of his relations with the beneficiaries under the will, or with his family, who would be his heirs-at-law; evidence of any declarations *that would indicate any purpose that he had with reference to the will*, must be received" (33).

The next declaration of Judge Holt offered in evidence was the declaration made to Mrs. Briggs, apparently some

time between 1888 and 1891, to the effect that his nephew, Washington Holt, would attend to his affairs after his death, and he, Joseph Holt, knew it would be all right (37, 38). So far as the record discloses, the discussion as to this evidence was mainly as to its bearing on the issue of revocation, and when the counsel for the caveators stated that they offered the evidence upon the question of forgery as well as on the issue of revocation, counsel for the caveatees simply submitted that it was not competent evidence on the issue of forgery without stating what the objection to it was (39). It will be seen that this declaration tended to show a strong feeling of affection toward and reliance upon Washington D. Holt by Joseph Holt at the time it was made.

Then follows immediately the stipulation of counsel that any declarations made by Joseph Holt after February 7, 1873, *as to his testamentary intentions* should be deemed to have been admitted, subject to the objection and exception last noted (39). The objection last noted, so far as the question of forgery is concerned, was a general objection, no ground whatever for it being specified (39).

Thereupon, subject to the stipulation just noted, counsel for the caveators gave evidence tending to prove the following declarations made by Joseph Holt between 1884 and 1893.

That Joseph Holt had told his nephew Washington that he had made him, Washington, his executor; that he had informed Washington Holt's daughter Mary and Washington Holt's wife, Vanda, that they would be much better off after his death; that they would then go to Europe; that he told Mary Holt that she must become proficient in French, so that while in Europe she could act as interpreter; that he had told the servants in his house that Washington D. Holt would have charge of his affairs after his death; and that about three months before his death he told Martha Scott, one of his servants, that his funeral was all in his will—that his will would not come out until after he was buried, and

that for that reason he wanted her when he died to see that a certain flag, which was in a trunk in his house upstairs, should be wrapped around his body (39, 40).

All these declarations, it will be seen, except the last one about the flag, tended to show great affection on the part of Judge Holt at the time they were made toward his nephew Washington and that nephew's family, and were inconsistent with the testamentary purpose manifested by the will in controversy. The declaration about the flag also tended to show that his testamentary intentions a few months before he died were not in accordance with that instrument.

It is important to note here that the same objection that was made to these declarations was made to the other evidence tending to show the relations between Judge Holt and the parties concerned after February 7, 1873. When that point in the case was reached, in the course of the evidence of Mrs. Iglehart, her testimony as to what took place in Washington, when she was here on her wedding trip, in 1874, was objected to "on the ground that testimony as to the relations between the testator and his relatives subsequent to the date of the will in controversy was inadmissible and incompetent upon the first issue, for the reason that it threw no light on the question whether or not the testator executed the will in controversy" (54). This objection having been overruled by the court, it was then stipulated that the same objection should apply to all testimony of a similar character thereafter offered and admitted (55); and when the letters from Joseph Holt to his relatives were offered in evidence all those subsequent to February 7, 1873, were objected to, and "all testimony as to the relations between Joseph Holt and his relatives subsequent to that date were and each and every of the said letters and items of testimony was objected to on behalf of the caveatees on the ground that testimony as to relations between said Holt and his relatives subsequent to the date of the will in controversy was inadmissible and incompetent upon the first issue,

for the reason that it threw no light upon the question whether or not said Joseph Holt executed the will in controversy" (61).

The objection made by the caveatees to the declarations of Joseph Holt in regard to having made Washington Holt his executor and other declarations tending to show that Washington Holt and his family would be financially benefited by his death are again stated on page 79 of the record, where the objection is thus worded:

"To the admission of which testimony as to the declarations by said Joseph Holt touching the disposition of his property after his death, the caveatees by their counsel objected, before the same was given, on the ground that such testimony was incompetent for the purpose of throwing any light upon the question whether or not the said Joseph Holt executed the paper-writing in controversy."

When the witness Martha Scott was asked as to the treatment of the Throckmortons by Judge Holt from 1882 until his death the evidence was objected to on the ground that it "could throw no light on the question as to the execution of the will" (82). So, when another of the servants, George Johnson, was inquired of as to the relations between Judge Holt and the Throckmortons between February, 1878, and December, 1884, it was objected to on the ground that it "threw no light" upon the execution of the instrument in controversy (83).

Mr. Barclay, for the caveators, deposed that in 1893 Judge Holt expressed warm regard for Mr. Barclay's aged mother, who had been Judge Holt's personal friend for many years, and remarked at that time that he had made his will and had by that will given some pictures to this old lady. The objection made to this evidence was that it was "inadmissible" (29).

We have now set forth everything in the record as to the objections made to evidence relating to Judge Holt's testamentary intentions after February 7, 1873, whether that

intention was manifested by his words or indicated by his conduct and feelings, and the rulings of the court thereon.

It clearly appears:

1. That no declaration by Judge Holt was offered as to whether he had or had not made the will in controversy.

2. That all of his declarations subsequent to February 7, 1873, offered in evidence by the caveators, tended directly to indicate what were his testamentary intentions *at the time the declarations were made.*

3. That all evidence as to the relations between Judge Holt and his relatives and between Judge Holt and the persons claiming under the alleged will after February 7, 1873, was objected to, and that the objection which was made to his declarations after that date was the same objection and made upon the same ground as other testimony tending to show what those relations were.

4. That it nowhere appears that at any time during the trial was it suggested that any declaration of Judge Holt was to be considered by the jury as evidence for any other purpose than to show his feelings and intentions at the time the declaration was made.

Nor is there anything to be found in the instructions of the court to the jury which indicates in the slightest degree that the jury were allowed to consider the declarations of Joseph Holt for any purpose other than that of showing his feelings and intentions at the time they were made. What the court said to the jury upon that question was as follows:

"You are also to consider the circumstances touching the relations of Joseph Holt to all the parties to this controversy, the next of kin, the people of his own blood, and the devisees under this will, up to the time of the date of this

will, bearing directly upon this question whether it would be likely that he would have made such a will at that time, and also the *subsequent conduct* of the testator towards his next of kin or heirs-at-law, and as well towards the beneficiaries under this will, as bearing upon the probability, the likelihood of his having made such disposition of his estate as is made by this paper in controversy" (131).

The Court of Appeals has not held that these declarations were competent for any other purpose than to show what was going on in the mind of Joseph Holt at the time he made them. In the opinion of that court it is said:

"But in a case where such proof [direct evidence of the execution of the will] is lacking or where by competent evidence the genuineness of the signature has been assailed to such an extent as to require the submission of the question of its forgery to the jury, we think the feelings of the testator towards all the parties and his relations with them, and apparent intentions as disclosed by his conduct and declarations, are competent for their consideration" (156).

And again:

"It follows from what we have heretofore said that testator's declarations tending to show the making of a will in Washington Holt's favor or appointing him his executor, were not competent to prove the execution of such a will either as a disposition of the estate or as a distinct revocation of the will offered for probate. *They were admissible, and seem to have been admitted only as one among other circumstances tending to show the state of mind of the testator* and shed light upon the issue of revocation by mutilation of the will offered for probate, and as such we have held them admissible on the issue in respect of forgery also" (159).

It is evident now that all that the caveators have contended for in this case, and all that the courts below have decided, is that testimony relating to Judge Holt's testamentary intentions subsequent to February 7, 1873, was competent evidence on the issue of forgery, as well as evidence relating to his testamentary intentions prior to that

date (which everybody conceded to be competent), and that his declarations after February, 1873, evidencing his testamentary intentions at the time they were made were not to be excluded, because in some instances they related to past transactions. It follows that the real question in the case is whether on the issue of forgery evidence of the alleged testator's testamentary intentions should have been confined to the period prior to February 7th, 1873.

Before proceeding to consider this question we wish to correct some of the errors contained in that part of the brief for plaintiffs in error which is headed "statement."

In the first sentence of this "statement" it is said that by the rulings of the trial justice a mass of testimony covering practically the whole life of the decedent was admitted in evidence after objection and exception of the plaintiffs in error.

Judge Holt was born in 1807 and died in 1894. We have already shown that the testimony as to the first sixty-six years of his life—that is, down to February 7, 1873—was admitted without any objection or exception.

It is stated on page 5 of the brief that the last thirty-four years of Judge Holt's life he spent alone, unattended by any relative, his household consisting merely of his domestic servants. The fact is that the testimony tended to show that several of his relatives, especially the members of Washington Holt's family, visited him frequently, sometimes staying six months at a time (69); that during the last five years of his life his nephew, William G. Sterett, and the latter's wife and children were constant visitors at his house (69); and that during the last fourteen years of his life neither Devlin nor any member of the Throckmorton family ever entered his door, except that on one or two occasions Miss Throckmorton obtruded herself upon him for a few moments (82–84).

On the same page of the brief it is stated that Joseph Holt espoused the Union cause with zeal and bitterness, while

his relatives allied themselves with the Confederacy. The bill of exceptions states that the evidence tended to prove that during the war Joseph Holt had not manifested any bitterness of feeling toward any of his relatives (49).

On page 6 of the brief it is said that Judge Holt, at the death-bed of his second wife, had promised to care for Elizabeth Hynes. The only evidence in the record upon this subject is the testimony of Mrs. Ray, a witness for the caveatees, that Judge Holt *told* her this in 1882. In view of the strenuous objection made throughout the brief in question to the admissibility of Judge Holt's declarations, it is somewhat singular that they should state to this court as a fact a matter as to which there is no testimony whatever except such a declaration. This declaration, of course, was competent only to show his feelings toward Miss Hynes at the time it was made.

On page 10 of the brief it is said that from 1862 to 1876, during the greater portion of which period Luke Devlin was a messenger in the office of the judge advocate general while Judge Holt was at the head of the office, Devlin "frequently met Judge Holt socially at the house of Mrs. Throckmorton, Senior, and occasionally called on him." As nobody but Devlin testified to this (22), and all the other testimony on the subject (43, 81) showed that it was untrue, it is misleading to state it to this court as a fact. There was not a particle of testimony in the case outside of Devlin's own testimony that he ever met Judge Holt at all after 1875 (84, 85).

On page 12 of the brief it is stated that the only correspondence of Judge Holt with his relatives prior to 1873 were certain letters, which are in the record. There was not a word of evidence to support this statement. The letters in question were the only ones that the record shows were produced and put in evidence. They were a few that had been saved during the period of over twenty years that

intervened between 1873 and the date of Judge Holt's death.

On page 13 of the brief it is stated that while Judge Holt lived in Mississippi, where his brother Robert resided, in the '50s, it does not appear that he ever saw any of Robert's children until after the war. Nor does it appear, so far as the record discloses, that he did not live at his brother Robert's house during the whole time that he was in Mississippi.

On page 16 of the brief and in many other places this court is informed that after Judge Holt's death two of his nephews, Washington D. Holt and William G. Sterett, burned such of Judge Holt's papers as they chose to destroy, and the impression is conveyed that they continued this destruction until stopped by one of the subordinates of the register of wills. What the evidence upon this subject was is not shown by the bill of exceptions. All that is said about it is that it tended to prove that "a number of private letters which said Holt had received from Washington Holt and family were burned in a coal scuttle in the yard by one Charles H. Strothers, one of the servants of the said Judge Holt; that some old newspapers and circulars were burned in a fireplace by the direction of said Washington Holt and Sterett; that no other of his papers were destroyed after his death" (80). The only other reference to this subject in the record is in the testimony of Strothers (87), where it is said that he testified that he burned about twenty-five letters in the coal scuttle in the yard by direction of Holt and Sterett, and saw some newspapers burned in the grate in the bedroom, and the testimony of Levy, an employé of the register of wills' office, that when he went to the house he saw that a considerable number of papers had been burned (48).

The rules of the Court of Appeals (like the rules of this court) are very stringent in their requirement that nothing shall be set forth in a bill of exceptions except what is necessary to an understanding of the questions of law brought to that court for review. No question of law was raised or

suggested during the trial in reference to the matter of the burning of Judge Holt's papers. The court was not asked to rule that any presumption of any kind arose from this circumstance. Testimony, therefore, that occupied many hours in giving was compressed into a few lines, because no question of law was raised in regard to it; and we submit that in the discussion of the case here it must be assumed that the evidence tended to show what the record says it tended to show, and nothing else. It must be held, therefore, that there was no evidence from which it could be argued that anything was destroyed except a few private letters from Washington Holt's family to Judge Holt, and some old newspapers and circulars.

Counsel say on page 82 of their brief that this "extraordinary"—this "all controlling"—fact of the burning of papers was ignored by both courts below. In justice they should have stated the further fact that so far as any question of law in the case was concerned it was also ignored by counsel for the caveatees. Its supposed importance is another of the discoveries made after the case came to this court.

In this connection we must controvert with emphasis the remarkable statement made on page 17 of the brief that from the time Judge Holt died to the present time the caveators "have been in absolute control of all his papers and effects." This reckless statement is made without reference to any part of the record which is supposed to support it. The fact is that all the papers of Judge Holt were taken charge of by his administrator, the National Safe Deposit, Savings and Trust Company, immediately after it was appointed administrator, in September, 1894, and that no one except the officers and employés of that company since that time has had access to the papers except by the consent of counsel on both sides. For months before the trial and during the trial, under a verbal agreement between the counsel for the respective parties, any of the counsel on

either side was allowed to examine the papers at his pleasure, and some of the counsel for the caveatees spent many days before the trial in the examination of the papers. During the trial it was further agreed that if the counsel on either side should produce a paper and state that it came from Judge Holt's papers that fact should be admitted without any proof. One of the officers of the National Safe Deposit, Savings and Trust Company shortly after the appointment of that company as administrator made a thorough search among the papers for anything of a testamentary character, but found no such paper, except the will of 1848 and a memorandum on a rough piece of paper containing the names of certain charitable organizations, with sums varying from $1,500 to $15,000 set opposite those names (80).

It is quite apparent from this misapprehension, and from many other things of a similar character in the brief, that, although the name of one of the counsel who participated in the trial is signed to the brief on behalf of the caveatees here, it must have been written by counsel who did not participate in the trial and was not familiar with what took place in court or between counsel before the trial began.

On pages 178 and 179 of their brief, counsel insist that Judge Holt's letters in evidence will be read in vain for a "syllable of suggestion" in the direction of his having made a will in favor of Washington D. Holt.

In his letter of October 16, 1881, to Washington D. Holt's wife, Judge Holt, writing from Washington city, said: "*I have a piano here as good as new which I wish Mary to have when I am gone*" (72).

Mary was Washington Holt's daughter. To us this letter seems marvelously like an instruction by Judge Holt to his executor.

While commenting on the absence of testamentary letters from Judge Holt to his relatives, it seems never to have occurred to Miss Throckmorton's counsel that it is somewhat

singular that not a letter of any kind from Judge Holt to her was produced at the trial.

On page 88 of their brief counsel say that it *unexpectedly* appeared at the trial that some of the caveatees had burned some of Judge Holt's papers. They do not assist the court by referring to the evidence, which tended to show that the caveatees were surprised by this evidence. The record does show that the letters which were destroyed were burned in the yard of Judge Holt's residence on the corner of C street and New Jersey avenue, and that the burning of circulars and newspapers was known at the time to an employé of the register of wills (80, 48). The reasonable inference would be that it was publicly known that papers had been burned in Judge Holt's house immediately after his death.

And if the writer of the brief in question will take the trouble to examine the files of any Washington newspaper for the week after the paper in controversy reached the office of the register of wills, he will find that column after column of matter relating to this burning of papers was then published, and of course came to the knowledge of the caveatees and their counsel. It is again obvious that the brief which sets up surprise on this point at the trial is not the product of counsel who participated in the trial.

And since counsel have dwelt so long on this subject it is well to remind the court that it is highly probable, to say the least, that this alleged will was burned in spots for the very reason that it *was* generally known that there had been some papers burned at Judge Holt's residence by those of his relatives who took possession when he died. Color would thus be given to the idea that in some mysterious way this particular paper had been saved from complete destruction in that way.

All these corrections are as to matters of fact not involving any of the questions of law with which alone this court has to deal in the case. So much space is devoted to them and to other questions which relate wholly to the facts, and

not at all to the rulings of the court at the trial, that it would seem that adverse counsel would like it to be seen how much better they could do at a second trial if this court would but give them a chance. If that were good reason for granting a new trial, few verdicts would stand.

THE ASSIGNMENTS OF ERROR.

We ask the court to note our objection to the form of the assignments of error contained in the brief filed on behalf of the plaintiffs in error in this court. There are fourteen of these assignments. Those numbered 1, 2, 3, 6, 7, 8, 9, 10, and 14 are to the rulings of the court in admitting certain evidence, but in no one of them is the evidence referred to set forth nor even its substance stated. Those numbered 4, 5, and 11 are to instructions given by the court or refused, but in no case are the instructions set forth or even their substance stated. The 12th and 13th are to the exclusion by the court of certain testimony offered in rebuttal. The testimony is not set forth, and its substance is very insufficiently and unsatisfactorily stated. We have been required, and the court will be required, to grope through the numerous pages of the record to which we are referred by these assignments, and we can seldom be sure that the counsel on both sides and the court will be dealing with the same subject-matter in considering any particular assignment.

ARGUMENT.

I.

FORGERY.

When the question before a jury is whether a paper propounded as a will is a forgery, and direct evidence as to the execution of the instrument is either absent or indecisive, resort to circumstantial evidence is not only justified, but is necessary. The most usual and the most important circumstantial evidence in such cases is that which relates to the testamentary intentions of the decedent before, at the time of, and after the date of the controverted paper. Such intentions can ordinarily be shown in but two ways: one by inference from the relations existing between him and the other persons concerned, and the other directly by his declarations as to what those intentions in fact are, and such a declaration is not to be excluded, either where it shows the decedent's feelings toward others or where it more directly states his testamentary intentions, because in addition it relates to past occurrences, as to which merely it would be hearsay.

We have seen that at the trial it was conceded by counsel for the caveatees that it was competent to show Judge Holt's testamentary intentions (and consequently the relations between him and his kinsmen and between him and the caveatees) prior to February 7, 1873. The caveators proved without objection that prior to the civil war the relations between Judge Holt and his family were as intimate and affectionate as is usual with persons standing in the same relation in which he stood to them; that though during the war all these relatives sympathized with the South and two of them were in the Confederate army, he had not

manifested any bitterness of feeling towards them; and that after the war and prior to February, 1873, his relations with his people were renewed (49, 50). They also proved, likewise without objection, that the person named as executor in the alleged will had been a messenger and copyist in the office of the judge advocate general while Judge Holt held that position, and that prior to February 7, 1873, there were no social or business relations between them (85).

So the caveatees proved, what was not disputed, that prior to February, 1873, Judge Holt for many years had provided for Elizabeth Hynes; that the relations between him and her were very close and affectionate, and that on the 7th day of February, and prior thereto, he held very affectionate relations with Major Throckmorton, his mother, his wife, and his two little children, one of them being the Josephine Holt Throckmorton named in the will; and generally each side put before the jury, without objection from the other, everything relating to Judge Holt's life from 1807 to February, 1873, that tended to show that it was likely that Judge Holt would not have made such a will as that which is in controversy.

Counsel for the caveatees at the trial, however, did consistently contend that evidence of this character should stop with the date of the alleged will, and they excepted to the rulings of the court admitting such subsequent evidence. But here it is important to note that their contention was that no evidence whatever was admissible as to the feelings of Judge Holt after February 7, 1873, either toward the beneficiaries named in the instrument in controversy or toward his own kindred, for the purpose of showing that it was not likely that he would have executed the will in controversy, or that it was likely that, if he made it, he would have revoked it.

They drew the line at the hour of the alleged execution of the paper in controversy (31, 32, 34, 39, 61, 79, 122, 138, 141, 142). That and that only was the question of law upon

which they asked for a ruling from the court on this part of the case. They insisted that such evidence must relate to a time "either anterior to the date of the will or cotemporaneous with it" (31). Neither during the taking of the testimony nor in the prayers for instructions, which were submitted to the court at the close of the evidence, did they suggest that such evidence might be competent if confined to a short or to a reasonable period or to any period whatever after the date of the alleged will. Yet in their brief they almost wholly abstain from discussing the point which they thus made. The great burden of their complaint in their brief is that the conduct and declarations of the testator were admitted on the issue of forgery at an *unreasonably long period* after February 7, 1873. They shrink from arguing here that upon which they stood at the trial—that the ears of the jury were to be absolutely closed as to everything that happened after February 7, 1873. But it is too late for them thus to shift their ground. The question here is whether the court below ruled properly on the points of law which were presented to it for determination during the trial.

In their brief here counsel for the plaintiffs in error, on page 108, correctly state that the caveators gave in evidence alleged declarations *and acts* of the testator tending, as they claim, to show his state of mind, feelings, and intentions subsequent to the date of the will in controversy, and that all this evidence was objected to by them. Yet it is remarkable that throughout the discussion of the evidence on the issue of forgery they confine themselves absolutely to that part of the evidence which relate to *declarations* of Judge Holt. Every case which they cite bearing upon the issue of forgery, and every paragraph of the text-books which they quote refers exclusively to evidence of declarations. Apparently they no longer contend as they did at the trial that it was incompetent to show that in 1874, when his niece, Mrs. Iglehart, came to Washington with her husband on their wedding

trip, that Judge Holt took them to his home and gave up his business and devoted his time to entertaining them, and that he was as affectionate toward them as any uncle could be, and that during that time he gave Mrs. Iglehart a handsome set of jewelry as a wedding present (54, 55); that from 1889 to his death Judge Holt's nephew, William Sterett, with his wife and three little children, lived at Washington and maintained with Judge Holt the most affectionate relations; that they visited him frequently at his house, and that he frequently went in his carriage to their house and took Mrs. Sterett and the children out driving; that he frequently made presents to Mrs. Sterett and the children (69); that Washington Holt and his family, after 1873, on many occasions, visited Judge Holt in Washington, and that Washington Holt's wife, being an invalid, remained at Judge Holt's house on one occasion for five or six months attended by physicians, whose bills were paid by Judge Holt; that Washington Holt's daughter Mary, in 1893, was living in Washington and visited Judge Holt every day and administered to his wants, and that down to the hour of his death nothing occurred at any time to interrupt the intimate and affectionate relations that existed between Judge Holt, on one hand, and Washington Holt and his family, on the other (69, 70).

It is manifest that counsel have been unable to find any authorities tending to support the position which they took at the trial, that the relations between Judge Holt and his kinsmen and between him and the Throckmorton family and Luke Devlin after 1873 could not be placed before the jury. They objected then to the declarations of Judge Holt upon the same ground upon which they objected to his acts. Both his acts and declarations were admitted as tending to show his testamentary intentions between 1873 and his death. Their whole contention was that his intentions during that whole period must be kept from the jury. They now shift their ground and claim apparently that the decla-

rations were admitted not for the purpose of either showing directly his testamentary intentions or showing them indirectly by manifesting his feelings toward the persons concerned, but for the purpose of showing that his statements as to past transactions were true.

Counsel for the caveatees at the trial did not ask the court to instruct the jury that the declarations of Judge Holt after February 7, 1873, were competent on the issue of forgery only for the purpose of showing Judge Holt's intentions as to the disposition of his property at the time they were made; and since those declarations were competent, as they now seem to admit, for the purpose of showing his feelings and purposes at the time they were made, they cannot complain here that the court did not in terms tell the jury not to consider them as evidence of the facts stated in them.

The general rule on this subject is thus stated in 2 Thompson on Trials, sec. 2338:

"It is a rule in the law of procedure, recognized and enforced in all jurisdictions, that in civil cases the judge is not bound to give his opinion to the jury upon any matter of law arising upon the evidence, unless requested to do so by one of the parties. Where no such request is preferred, the presumption is that the jurors are acquainted with the rules of the law applicable to the case, and the failure to instruct them cannot be assigned for error."

In further discussing the same subject the learned author of the work in question says:

"SEC. 2341. *Specific instructions must be asked for.*—It is, then, a general rule of procedure, subject, in this country, to a few statutory innovations, that, mere *non-direction*, partial or total, is not ground of new trial, unless specific instructions, good in point of law and appropriate to the evidence, were requested and refused. A party cannot, by merely excepting to a charge, make it the foundation for an assignment of error, that it is indefinite or incomplete. The rule rests upon the soundest foundation. The facts of the case come to the mind of the judge as matters of first impres-

sion, and it will often be extremely difficult for him, in the short time allowed for a trial before a jury, and in the midst of such a trial, to prepare a series of instructions applicable to all the hypotheses presented by the evidence. On the other hand, counsel are presumed to have studied their case beforehand; to come to the court with a fair understanding of the facts which will probably be proved, and with a full knowledge of the law applicable to those facts. It is, therefore, their duty to give attention to the charge of the judge, and if, in their opinion, it omits to give direction as to the law applicable to any essential feature of the evidence, to call his attention to the omission and to request appropriate suppletory instructions; and where they fail thus to call his attention to something which he may fairly be supposed to have omitted from inadvertence, they ought not to be allowed to complain of the omission in an appellate court. A rule which would allow them to do so would be extremely inconvenient. It would multiply new trials and reversals, and often on grounds which have no connection whatever with the merits."

This court has frequently and consistently held that the omission of the trial judge to properly instruct the jury on any question of law arising in a civil case is not ground of error when the court has not been requested to give such instruction. (See Armstrong *vs.* Toler, 11 Wheat., 276, 277; Castle *vs.* Bullard, 23 How., 172, 189, 190; Express Co. *vs.* Kountze, 8 Wall., 353, 354; Butler *vs.* Maples, 9 Wall., 766, 776; Shutte *vs.* Thompson, 15 Wall., 151, 164; Mut. Life Ins. Co. *vs.* Snyder, 93 U. S., 393, 395; Hartford Life Ins. Co. *vs.* Unsell, 144 U. S., 450, 451.)

In Pennock *vs.* Dialogue, 2 Pet., 15, Mr. Justice Story, delivering the opinion of the court, said:

"In the argument at the bar much reliance has been placed upon this evidence by the counsel for both parties. It has been said on behalf of the defendants in error that it called for other and explanatory directions from the court, and that the omission of the court to give them in the charge furnishes a good ground for a reversal, as it would have furnished in the court below for a new trial; but it is

no ground of reversal that the court below omitted to give directions to the jury upon any points of law which might arise in the cause, where it was not requested by either party at the trial. It is sufficient for us that the court has given no erroneous directions. If either party deems any point presented by the evidence to be omitted in the charge, it is competent for such party to require an opinion from the court upon that point. If he does not, it is a waiver of it. The court cannot be presumed to do more in ordinary cases than to express its opinion upon the questions which the parties themselves have raised at the trial."

In the case of Potter *vs.* Baldwin, 133 Mass., 427–429, the supreme judicial court of Massachusetts thus disposed of a similar question coming before that court in a contested will case :

" Upon similar grounds, the evidence of a conversation the night before he died, in which he stated that he wished ' to see his son Joseph, and that he did not know but that he had been deceived,' was admissible to show his state of feeling toward his son and Francelia S. Lane. The wish to see his son might well be considered as showing a kindly feeling toward him (Lewis *vs.* Mason, 109 Mass., 169). While the declaration did not state by whom he felt that he might have been deceived, yet, when taken in connection with the evidence appearing in the case in regard to Mrs. Lane, it might have been found by the jury to refer to her and to exhibit his then state of feeling toward her.

" In proving the existence of that undue influence over a testator by which his will may be avoided, two things are necessarily to be shown, the extraneous words, acts or circumstances by which it has been exerted, and the effect thereby produced upon the mind of the testator, the former of which cannot, the latter of which may, be shown by his declaration. The difference is certainly obvious between receiving the declarations of a testator to prove an external fact, such as duress, fraud, or importunate solicitation, and as evidence merely of his mental condition. In the one case it is hearsay evidence, and open to all the objections applicable to that species of evidence, while in the other it

is appropriate and directly bears upon the issue to be tried (Waterman *vs.* Whitney, 1 Kernan, 157, 165).

"For the purpose for which it was admitted, the evidence was therefore competent. It is not to be inferred that it was applied by the jury to any other purpose. If these conversations were used at the trial by the counsel for the appellant in his argument for the purpose of showing undue influence and deception by Francelia S. Lane, such use was certainly improper. But the counsel for the appellee asked no instructions as to the use and effect of this evidence, nor did he, so far as the bill of exceptions shows, call the attention of the presiding judge to the matter. He cannot now object that it was not limited by the presiding judge in his instructions to the only purpose for which it was competent. If evidence be admissible for any purpose its admission cannot be made a ground of exception, unless it be shown that the judge refused to limit it to that purpose and permitted it to be used for a purpose for which it was not competent, against the objection of the excepting party (Howe *vs.* Ray, 113 Mass., 88; Packer *vs.* Lockman, 115 Mass., 72). As the evidence had been admitted for a purpose we deem to have been competent, and as no instruction was requested or given limiting its effect to that purpose, we cannot infer otherwise than that both the counsel for the appellee and the presiding judge deemed *that the purpose of its admission had been stated with sufficient clearness at the time it was received*, and that notwithstanding the argument of the counsel for the appellant there was no danger that the jury would be misled in its application. Had the counsel for the appellee thought differently he certainly should have called the attention of the presiding judge to the matter. Not having done so, he has now no just ground of complaint."

But as a matter of fact in the case at bar the court, in the general charge to the jury, did refer to this matter, and erred, if at all, by laying down the law too rigidly in favor of the caveatees. Thus, in instructing the jury upon the first issue, as to the genuineness of the document in controversy, the court, after referring to Judge Holt's character and attainments, and his letters that were in evidence, and the opin-

ions of experts and non-experts, and the evidence on both sides as to his relations to the various parties to the controversy prior to the date of the paper in dispute, told the jury that they were also to consider "the subsequent *conduct* of the testator toward his next of kin or heirs-at-law, as well as toward the beneficiaries under this will, as bearing upon the probability and likelihoood of his having made such disposition of his estate as is made by this paper in controversy" (131). It will be seen that the declarations were not mentioned at all, and were not included in what the court submitted to the jury upon this issue, except as they would bear upon the question of the conduct of the testator toward the parties to the controversy either before or after the date of the alleged will; and it was only when the court came to the other issue, the one relating to revocation, that the court told the jury that in that connection they "should take into consideration all the declarations of the testator, especially those made in the latter part of his life, in his last days" (135).

Counsel aver that the trial justice in this case was unduly influenced by what he considered to be the extraordinarily novel character of the case to open the door to evidence that should have been excluded. We shall show, we think, that this is a mistake; but something must be left to the discretion of a judge presiding at a jury trial when the issue joined must be determined by purely circumstantial evidence.

In the case of Moore *vs.* U. S., 150 U. S., 57, this court said:

"As intimated in the case of Alexander *vs.* The United States, 138 U. S., 353, where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors. There are

many circumstances connected with the trial, the pertinency of which a judge who has listened to the testimony and observed the conduct of the parties and witnesses, is better able to estimate the value of than an appellate court, which is confined in its examination to the very words of the witnesses, perhaps imperfectly taken down by the reporter. It was said by Mr. Justice Clifford, in delivering the opinion of this court in Castle *vs.* Ballard, 23 How., 172, 187, that 'whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually, and almost necessarily, depend upon their connection with each other.'"

In the case now before the court it has not before it even the words of the witnesses. Testimony which occupied more than a month in taking is here compressed into a few pages, showing in general merely what that testimony "tended to show."

Proceeding now to the consideration of the question of law raised at the trial as to the competency of the evidence that was objected to on the issue of forgery, we think we may safely say that there has not been found a single case in any court in which it has been decided that on the trial of an issue of forgery in a will case it is not competent to prove the testamentary intentions of the decedent after the date of the alleged will.

Cases there are in which declarations of the testator made subsequent to that time have been held inadmissible, but they are, without exception, we think, cases in which either the declarations were solely as to whether he had or had not made the will or they were treated by the court as declarations tending to establish the facts to which they related and not merely as showing the feelings or intentions of the testator at the time they were made.

On principle it seems impossible to exclude such evidence. It is far more important to know what were the relations between the supposed testator and the other parties after the date of the will than before. Long-continued affection on the part of the testator toward a person named in the will or long-continued hostility toward that person prior to and up to the date of the instrument in controversy may tend to show that it was or was not likely that he would have executed such a paper. If the inquiry be stopped at that moment, then it may reasonably be assumed that the affection, in the one case, or the hostility, in the other, had ceased to exist, although up to that time the change had not been manifested to others; but if it be made to appear that such affection or hostility continued unabated until the testator died, this conjecture is rendered impossible, *and the longer the period between the date of the will and the date of the death of the supposed testator the stronger the argument becomes.* He who proposes a paper as a will necessarily asserts not only that the supposed testator executed it at the time it bears date, but that it continued to be his intention till he died that his property should go as the will directs. Evidence, therefore, which tends to show that it is improbable he would die leaving such a will is as pertinent to the issue of forgery as evidence that it is improbable he would have made it at the time it bears date.

Adverse counsel dispute this in their brief. They have found here and there a case in which a man supposed that his will had been revoked when in fact no sufficient revocation had taken place, and they use these cases to show that the testamentary intention and the testamentary fact may be two very different things. It is of course true that an insufficiently executed will or a defectively revoked one may lead a testator into misleading conduct and declarations manifesting his expectations as to where his estate will go when he dies. But is such evidence to be excluded in every case for that reason? As well might it be said that

3092

declarations as to pedigree shall always be excluded because occasionally a family is under an erroneous impression as to the fact of a marriage or as to the paternity of a child. As well exclude all declarations against interest because sometimes such a declaration is not true and is made to mislead those who hear it.

It is conceded in the brief of our adversaries that evidence of this character is always competent when the issue is mental incapacity or undue influence. They themselves cite many cases in which it has been held that where the issue is undue influence subsequent declarations of the testator to the effect that he had not made the will freely or that he had been made to do it have been held competent as showing his state of mind at the time the declarations were made. In the few cases in which such subsequent declarations have been held inadmissible, where the issue was fraud or forgery, the fact that such declarations might bear upon the issue by showing the testamentary intentions of the testator at the time they were made has not been presented to or considered by the courts, and we think we may safely assert that in every case in which it has been so presented the testimony has been held competent. It would be strange, indeed, if after a man is dead and a will should be proposed, bearing his signature, by which he gave all his property to a stranger, to the exclusion of his children, that it should not be competent to show at the trial of the issue of forgery that he loved his children after the date of the instrument as well as before. Indeed, on the theory upon which this case is presented here by the other side, it would be error in such case to allow the jury to know even that the children lived after the date of the instrument, for the only purpose of such evidence would be to show that it was not likely that he would have forgotten them, and the whole burden of the argument is that that is not allowable.

On this subject that part of the brief which we are an-

swering is confined exclusively to *declarations* made by Judge Holt after February 7, 1873. We have seen that at the trial the objection went to all the evidence as to his relations with the parties concerned after that date; but certainly his declaration that he did not know the Throckmortons and that they were his enemies was just as competent for the purpose of showing his relations toward that family as evidence that they never visited him and that he did not allow them to enter his house; as competent even as Major Throckmorton's letter to Judge Holt of January 2, 1891, with which he was confronted after he had stated there had never been any serious difficulty between him and Judge Holt, and in which letter he said:

"After many years of separation I again approach you for assistance. * * * A terrible misunderstanding or misrepresentation has come between us" (110).

Indeed, counsel for the caveatees here seem themselves to think that evidence of declarations made by a testator after the date of the alleged will are competent, and, indeed, decisive, provided they are in favor of the will, for they say, on page 153 of their brief:

"If, however, the declarations were in effect such as showed knowledge or recognition by the testator of the disputed codicil, such evidence, of course, would have been admissible, not to prove the execution of the paper, *but simply to show knowledge of its existence and contents.* Knowledge of the existence and contents of the paper would fairly tend to indicate genuineness, because if forged, it would be extremely *improbable* that the testator should have had any knowledge on the subject, or even any means of knowledge."

Again, on pages 198, 199, they say, referring to a case in this court:

"It does not appear that this declaration was objected to, but it was plainly admissible as showing the testator's knowledge of the existence and contents of the codicil."

Counsel who wrote the brief from which these quotations are taken appeal earnestly to this court not to hold that declarations such as were admitted in the present case are competent evidence, because they anticipate that in that case great harm will be done in the future by having genuine wills broken by confiding juries who will believe trumped-up declarations in opposition to clear proof of the execution of a will; yet we find them conceding the admissibility of just such evidence where the danger is at least equally great. The forger of a will is not likely to have much difficulty in finding witnesses of his own kind to testify that they heard the testator declare that he made just such a will. Indeed, he can complete the case by giving such testimony himself.

Without expressing any opinion as to who was concerned in the forgery of this particular will, it may be mentioned, for instance, that Miss Throckmorton had a few moments' private conversation with Judge Holt in 1892, and that she testified that at that time Judge Holt told her "that he had provided for her, and that she would be perfectly independent" (116). We understand her counsel to admit that this was competent as tending to show Judge Holt's knowledge of the "existence and contents" of the will in dispute in 1892. We agree with them, but we fail to see how such evidence is admissible while other declarations made about the same time showing that he understood his will then in existence to make Washington D. Holt his executor and give Washington Holt's family large benefits should be excluded.

The reasoning of counsel leads to this further absurdity: They truly say that sometimes a man, with good reason, conceals his real testamentary intentions by declarations which he knows at the time are not true. Yet we now find them asserting that if, after his death, a will should be forged to fit the declarations as made they would be competent evidence to sustain it, while any inadvertent remarks on

the same subject that he might have made that were true would have to be ruled out.

It will occasion no surprise that no instruction was asked for at the trial of this case that the declarations of Judge Holt, made after February 7, 1873, were not admissible for the purpose of proving the truth of any statement that may have been contained in such declarations as to past transactions. In the case of Barbour *vs.* Moore, which is reported in 4 Appeal Cases D. C., 535, the effect of such declarations in will cases had been determined by the Court of Appeals, and that decision, of course, governed everybody at the trial of the present case. The counsel who represent the caveators in this case had both been of counsel, though on opposite sides, in the case of Barbour *vs.* Moore. At the trial of that case numerous declarations made by the decedent after the date of his alleged will were admitted in evidence, and the court at the trial, at the request of counsel for the caveators, instructed the jury that such declarations were competent only for the purpose of showing the "mental condition" of the testator at the time they were made, and not as proving or tending to prove the truth of such statements. On appeal the Court of Appeals construed this instruction to mean that the jury were to consider such declarations only as bearing upon the question of the mental *capacity* of the alleged testator and held the instruction to be erroneous, the court saying that such declarations are admissible "as showing the motives, feelings and designs of the testator."

It will be seen, therefore, that when this case was tried counsel on both sides and the court were advised that the appellate tribunal held such declarations admissible only for the purpose mentioned in the above extract from the opinion of that court. There was no contention made by anybody at the trial of this case that these declarations were

competent for any other purpose. It was not until in the appellate courts counsel who were not present at the trial came into the case that it was suggested that any of these declarations were proved for any other purpose than that above indicated.

The extent to which the declarations of a person may be offered in evidence as tending to show what is going on in his mind at the time is well illustrated by the decision of this court in the case of The Mutual Life Insurance Company *vs.* Hillmon, 145 U. S., 295. That case involved two actions upon policies of life insurance. The claim of the insurance companies was that the body which was found, and which was claimed to be the body of Hillmon, whose life had been insured, was really the body of a man named Walters. As a part of their evidence, they undertook to show that Walters had gone to the locality where the body was found in company with Hillmon, and that he had then disappeared and was never afterward heard of by his family and friends. To prove this part of the case, they gave in evidence to the jury certain letters written by Walters stating that he was going with Hillmon to the place referred to. The question in the case was whether these letters or written declarations were competent as evidence tending to prove that in fact Walters did go with Hillmon to the latter's camp. On that subject this court said :

"But upon another ground suggested they should have been admitted. A man's state of mind or feeling can only be manifested to others by countenance, attitude or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant

the admission of declarations of the intention. *But whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party.*

"The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it; and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation.

"The letters in question were competent, not as narratives of the facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, *he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon*, than if there had been no proof of such intention. In view of the mass of conflicting testimony introduced upon the question whether it was the body of Walters that was found in Hillmon's camp, this evidence might properly influence the jury in determining that question."

A similar question was raised in Commonwealth *vs.* Trefethen, 157 Mass., 180. In that case the inquiry was whether a woman whose body had been found had committed suicide. On the day before she disappeared she had stated that she intended to drown herself. The court held that this declaration was admissible in support of the contention that the death was caused by suicide, saying:

"If the day before her death she had written a note addressed to her mother, stating her conditition and declaring her intention to drown herself, and had left it in her desk when she went from home the following day, the admissibility of such a letter in evidence after proof that she had written it depends upon the same considerations as the ad-

See also Brown vs. Sutton.
129 U. S. 242.

missibility of evidence of similar oral declarations. Such a written declaration differs from an oral declaration only in this, that writing is often a more deliberate act than speaking; but this affects only the weight of the evidence. It may also be thought that speech is a less trustworthy indication of what is really in the mind of the speaker than acts or appearance; but this, if it be so, also affects the weight of the evidence."

We proceed now to consider the cases growing out of contested wills which, to our mind, support our contention that the declarations of Judge Holt, made after February 7, 1873, were properly admitted in evidence as tending to show his feelings and intentions at the time they were made.

In doing this we shall not confine ourselves to cases in which the declarations were admitted on the issue of forgery alone, although several such cases will be found in the list. Our opponents, in dealing with the competency of such declarations in cases where the issue is mental capacity or undue influence, seem to assume that the only purpose for which such declarations are admissible in these cases is to show mental weakness or mental vigor, yet running through nearly all such cases will be found rulings admitting such evidence for the purpose of showing the alleged testator's relations to the other persons involved and other evidence going to show the probability or the improbability of his making such a disposition of his property as the instrument in controversy directs.

In cases of alleged undue influence, for instance, the long-continued hostility of the decedent to the beneficiaries named in the will, or his long-continued affection for those excluded by it, is a fact which is always allowed to go to the jury with the other surrounding circumstances, and such hostility or affection is always allowed to be shown by the declarations of the decedent. Such declarations, we think, have never been excluded in will contests, whatever

the objection to the will, when offered only to show the feelings and intentions of the decedent when they were made.

In Adams *vs.* Norris, 23 How., 353–368, the question was whether a codicil to a will had been executed in accordance with the formalities required by law. The codicil gave certain real estate to a nephew of the testator. This court held that the declarations made by the testator after the date of the codicil, that he had given the land in question to his nephew, were admissible in corroboration of other evidence as to the fact of execution and the testator's knowledge of the contents of the paper.

In Mooney *vs.* Olsen, 22 Kansas, 77, Mr. Justice Brewer, in discussing the competency of the declarations of a testator in a will case, says:

"But while declarations are not admissible as mere impeachment of the validity of a will, they are admissible as evidence of the testator's state of mind. A man's words show his mental condition. It is common to prove insanity by the party's sayings as well as by his acts. One's likes and dislikes, fears and friendships, hopes and intentions, are shown by his utterances; so that it is generally true that, whenever a party's state of mind is a subject of inquiry his declarations are admissible as evidence thereof. In other words, a declaration which is sought as mere evidence of an external fact, and whose force depends upon its credit for truth, is always mere hearsay, if not made on oath; *but a declaration which is sought as evidence of what the declarant thought or felt*, or of his mental capacity, is of the best kind of evidence."

A leading case on this subject is Collagan *vs.* Burns, 57 Maine, 449.

In that case it was found after the testator's death that the will had been torn and pasted together, and the question of fact was whether he had torn it himself, or whether his mother had torn it and he had pasted it together to preserve it. A jury having found upon the evidence that there was no revocation, the trial judge never-

theless refused to admit the paper to probate. On appeal by a divided court the verdict of the jury was affirmed and the will sustained. In the prevailing opinion it was held that evidence had been properly admitted to show that after the tearing and pasting the testator had said that his mother had torn the will in a tantrum and he had pasted it together; that he had said that he had given his wife his property, and that all he had was hers, she being the beneficiary under the will, and that he had made numerous declarations of continuing affection toward his wife (450, 451). The prevailing opinion held, in substance, that an intention to revoke, as well as a tearing, was necessary, and that the plaintiff's subsequent declarations were as proper to prove his intention as other circumstances; that unless such evidence be admitted spoliation will be triumphant, and that its exclusion is the resort of barbarism (457, 458); "that such evidence may raise an improbability, almost amounting to an impossibility, that the testator had destroyed his will," and so should be admitted at the trial (461, 462); that the objections to such evidence are the same as those formerly urged against testimony then excluded, but now received, the insufficiency of which is now almost universally acknowledged (465); that such testimony is always received when sanity is in question, and is just as liable to be false in such a case as in any other (467).

The dissenting opinions in Collagan *vs.* Burns are based upon the ground that the declarations in question were purely hearsay evidence and should be excluded for the same reason that such evidence is excluded in other cases. The principal dissenting opinion was written by a judge who had presided at a former trial of the case and who thought that the evidence the admissibility of which was in dispute was perjured testimony.

In Hoppe *vs.* Byers, 60 Md., 391, the whole question was whether the paper involved in the case was the genuine will of the alleged testator. The paper was in the shape of an

informal writing, without witnesses, and there was evidence on both sides on the question of handwriting. Numerous declarations alleged to have been made by the testator after the date of the paper were admitted in evidence at the trial. The court of appeals of Maryland held these declarations competent, saying:

"But apart from direct authority on the subject, if declarations of a deceased party are admissible in any case, or to any extent, or for any purpose, where the validity of an instrument set up as his will, is in controversy, why should they not be admitted in a case like the present? This paper, if it be testamentary in its character (a question not now to be decided), can be effective only as a will of personalty. It does not profess to pass real estate and was not attested by witnesses. There was no witness who could prove that he saw the deceased write or sign it. Proof as to his handwriting by witnesses acquainted with it, was the only *direct* testimony by which the genuineness of the instrument could be established or assailed. Such testimony was offered, and we infer from the record, that a large number of witnesses, and perhaps an equal number on each side, testified upon this subject, those for the caveators swearing that to the best of their knowledge and belief the writing was not, and those for the caveatees that it was, the handwriting of the decedent. The jury had also before them on the same paper the admittedly genuine part of the letter and were at liberty to compare this with the disputed writing. But in this state of case was no other evidence admissible. Were the jury bound to decide the issue and make up their verdict upon such testimony alone and do the rules of evidence inexorably exclude from their consideration every other fact or circumstance that would tend to throw light upon the subject, so as to render it probable or improbable that such a paper was ever written by the deceased, or in corroboration of the direct testimony as to handwriting given on either side? We think not. It must be admitted that testimony as to handwriting, in any case of alleged forgery, though the best the nature of the case admits of, is usually the most unsatisfactory species of evidence courts of justice have to deal with. It is matter of common experience in such cases that witnesses of equal honesty and character, and with equal means of knowledge,

are found to testify both for and against the genuineness of the disputed signature. The difficulty and doubt are increased in a case like the present, where the instrument alleged to be forged is set up as a will which takes effect only after death, and where a forgery, if committed, would surely [seldom] if ever, come to the knowledge of the party whose testament it purports or is said to be. It seems to us that in such a case every collateral fact and circumstance which is not immaterial or irrelevant ought to be admitted, to aid the jury in reaching the *truth*, which after all is the object of every jury trial.

"The relation which Mrs. Beyers had occupied to the deceased, the feelings, whether friendly or otherwise, which during his life, he manifested towards her, are facts which are certainly not immaterial or wholly irrelevant, and where such feelings have been manifested, as they usually are, by declarations made to intimate and confidential friends who are clear and positive in their statements of them, and especially when made under such circumstances as to show that they were earnest and sincere, we see no good reason why they should be excluded from the consideration of the jury. So again, and upon the same ground, his declarations made before the date of the disputed paper, to the effect that he intended to give her a share of his estate, followed by declarations made after that date to the effect that he had done what he had said he would do, and had secured to her, or given to her, a share of his estate, were, in our opinion, *admissible* in evidence. In such case the *time* when the declarations were made is of less importance than in cases where *mental condition*, at a particular period, is sought to be shown. Of course more or less *weight* is attributable to them according as they were more or less remote from the date of the disputed writing, but their *admissibility* is not affected thereby. Entertaining this view of the law on the subject, we have carefully examined the declarations testified to by the several witnesses on the part of the caveators, and are of opinion they were each and all admissible. In this connection it is proper also to say that if the question were before us we should entertain no doubt as to the admissibility of the declarations offered on the part of the caveators, testified to by their witnesses as made after the date of the alleged testamentary paper."

Counsel for the plaintiffs in error devote a great deal of space to the discussion of Hoppe *vs.* Byers, and seem to think that it is the case principally relied upon by us to sustain the courts below in their ruling on the question of the admissibility of the testator's declarations in this case. We do consider it as a case entitled to great respect and consideration here, but it could be struck out from our brief without in the least affecting the strength of our case.

One criticism is made here upon the opinion in that case and upon that of the Court of Appeals in the present case in which we concur, and that is that they intimate that the admissibility of such declarations is dependent upon what is called direct evidence as to handwriting. We think that opinions as to handwriting are not properly direct evidence. They merely show that the handwriting of the disputed paper resembles that of the decedent. This is only a circumstance. The resemblance may be accidental or the result of fraud. Nor do we think that evidence which purports to show a certain state of facts is to be admitted simply because there is other proper evidence tending in the same direction, or that it is to be excluded because such other proper evidence is not obtainable. We contend that if all the opinions as to the handwriting of Judge Holt in this case had been in favor of the will in controversy his declarations would have been just as competent as if all those opinions had been that the instrument was a forgery. Nor do we think that even the presence or the absence of the testimony of witnesses as to the direct fact of the execution of such a paper can have any bearing upon the question of the admissibility of the testator's declarations, either before or after the date of the alleged execution of the will in dispute. But we radically differ with our learned opponents here as to the conclusions to be drawn from these premises. They seem to think it would be dangerous in the extreme to permit the testimony of living witnesses to the fact of execution, or opinions that the handwriting is genuine, to be

met and possibly overcome by mere oral declarations alleged to have been made by the testator. That the most solemn written declarations would be excluded by the rule that they lay down is a difficulty which they pass over in silence. But let us apply their reasoning to evidence which is universally conceded to be competent in such a case. Suppose that in this case General Grant, General Sherman, and Mrs. Sherman had been living when Judge Holt died, and that they and a half dozen other reputable witnesses had testified that they saw Judge Holt sign this paper and heard him at the same time declare that it was his will. Would such a state of facts make it incompetent to put on the stand on the other side some disreputable person, who twenty years before had seen Judge Holt write his name once, to give his opinion that the signature of the testator was not genuine? Would it have prevented us from placing upon the stand vagabonds to testify that at the time and place fixed by the witnesses in behalf of the will they had seen Judge Holt a thousand miles away? Clearly not. Yet no one would argue that for that reason opinion evidence as to handwriting and proof of an alibi should be excluded in every case. We might pursue this line of argument indefinitely. If the reasoning of our opponents here is good, by the same reasoning it could be shown that all classes of evidence are dangerous in the extreme and should therefore be excluded.

We do not care to follow counsel in their discussion of the cases and text-books cited in Hoppe *vs.* Byers, except in so far as they are otherwise referred to in this brief. It will sufficiently appear, even from what is said of these citations on pages 149 to 172 of the opposing brief, that the array of authority in support of the conclusion of the Maryland court of appeals is overwhelming, even without the many additional cases referred to in this brief. All the labor of counsel in this regard is thrown away, because the Maryland court held the declarations admissible for one purpose and counsel argue that ~~it was~~ they were inadmissible for another.

In the case of Scott *vs.* Hawke, 105 Iowa, 470, the will in controversy purported to have been executed by the testator by making his mark. The trial court instructed the jury to render a verdict against the will, because there was no competent evidence in the case of its execution. A petition for a new trial was filed, in which it was averred, among other things, that the proponent of the will had discovered that the testator had been shown the will by a man named Mohland, and had pronounced it to be genuine. Under the practice in Iowa the petition setting forth these facts was demurred to, and when the demurrer was overruled an appeal was taken to the supreme court of the State. That court held the evidence admissible, saying:

"The evidence of Mohland was both competent and relevant. The subscribing witnesses were dead, and other evidence of the execution of the will was admissible (Allison *vs.* Allison, 104 Iowa, 130). That the deceased, upon the examination of the instrument and the signatures thereto, declared it his will, is convincing evidence of its execution by him."

In Turner *vs.* Hand, 3 Wall., Jr., 88, Mr. Justice Grier, while trying a case on circuit in which, although five witnesses had testified to having seen the testator sign the will in controversy, it was claimed to be a forgery, charged the jury as follows:

"While it is undoubtedly true that parol declarations of a testator made before or after executing his will ought not to be received as a ground for altering or annulling it, yet cases *may* arise where such declarations, in connection with other circumstances, may be taken into consideration, as, for example, where there is strong evidence of conspiracy and of fraud practiced on the testator, or that the instrument is forged and false.

"In order to elucidate this principle let us suppose a case. A will is produced in court, regularly proved according to law, yet notwithstanding the legal proof it may possibly never have been seen by the testator, never have been signed and sealed by him, and consequently does not contain his

will as to the disposition of his property. Suppose it to have been made (as has sometimes been the case in Ireland and other places) by some person personating the testator, and simple and perhaps honest people have thus been prevailed upon to attest it. In such a case the signatures may be so palpably a forgery as at once to detect the fraud to any judge of handwriting. Again, suppose the will disinherits a child, a grandchild, or other relative, who has been the favored and beloved companion of the testator's life, whom he had uniformly pointed out and always and invariably, through his whole life, declared his intention of making his heir, and in whose favor a prior will was duly executed. Suppose the devisee in this supposed will was some worthless fellow, unknown to the testator, or, if known, despised or abhorred by him. Suppose the witnesses to be of the same character, low and degraded, with whom the testator never associated. Would not such facts, if clearly proved, condemn such instrument in the mind of every rational man? Would not the moral impossibility that the testator could ever have made such a disposition of his property be sufficient to outweigh the positive testimony of such witnesses?

"It is easy to forge the handwriting of almost any man so that it may be almost impossible for the best judges to discriminate between the false and the true, and it is too true that persons may be found willing, for a sufficient consideration, to swear to any statement of facts. Fraud can be generally proved only by circumstantial evidence. A number of distinct facts, clearly proved, may be so utterly inconsistent with the truth of the instrument as most satisfactorily to establish the fraud. The fact that the testator had uniformly, through his whole life, declared that he intended a certain relative to be his heir, that he made his will in his favor, may be an important link in the chain of circumstances from which fraud, perjury, conspiracy, and forgery may be clearly proved."

In Johnson *vs.* Brown, 51 Tex., 65, decided in 1879, in which the sole issue was as to the forgery of a paper offered as a will, the court held to be competent evidence declarations of the testator made before the date of the will, that the legatees never would have any of his property, and after

that date that they had colluded to rob him, but he would fix his property so that they could get nothing he had, and generally declarations of the alleged testator showing feelings of hostility toward the legatees. After considering the leading cases upon the subject, the court, on pages 79 and 80, says:

"None of the cases to which we have referred, however raise from the facts of the particular case as reported, the precise point now before the court—the admissibility of the declarations of the testator to invalidate a will upon the ground of forgery. But as remarked in Griffin *vs.* Stadler, 35 Texas, 706, they are generally cases which presuppose that there is no question or doubt as to the complete execution of the will. The authorities seem to be very few in which declarations of a party are sought to be introduced to prove that a will purporting to be his, is a forgery. This arises doubtless from the very nature of the case, as a will, being an instrument to take effect after death, would, if forged, rarely, if ever, come to the knowledge of the one who purports to be the testator.

"After full consideration of the question in this case, we are of opinion that the declarations of J. W. Warren before and after the date of the proposed will, expressive of feelings of ill will toward the beneficiaries, as were his feelings of kindness toward them, were properly admitted in evidence—not of themselves as proof sufficient to overcome the testimony of the subscribing witnesses, but as a circumstance in a case of this character, proper for the consideration of the jury in connection with all the other facts and circumstances in evidence; that they are not so much declarations disparaging a duly executed will as evidence of an independent collateral fact—the state of feeling between the parties—and which would in some degree tend to prove the issue before the court."

In the great case of Sugden *vs.* Lord St. Leonards, L. R., 1 P. D. (1876), 154, which was decided in 1876, the suit was filed to establish a lost will in connection with several codicils which were found in the testator's box where he kept his private papers. It appeared that the key to this box

was kept in a desk to which several persons, servants and others in the house, had access. The principal evidence of the contents of the lost will was the testimony of the testator's daughter, who was deeply interested in having the lost will established, but who was, notwithstanding, admitted by the counsel opposed to her to be a credible witness. She had read the will several times, and was able to state substantially its contents. Although her integrity was not assailed, her recollection was disputed. One of the principal questions in the case was whether it was competent to prove the declarations of the testator as to the contents of the missing paper for the purpose of corroborating the daughter. The case was first heard before Sir J. Hannen. He gave great weight to the declarations of the testator subsequent to the date of the lost will, which, if true, showed that the testator believed that a will containing the provisions of the lost will was in existence (198–203).

The case was heard on appeal from Sir J. Hannen's decree establishing the will. The principal opinion was delivered by Cockburn, chief justice. He, too, lays great stress on the testator's admission of his duty and intention to provide for his daughter, and his subsequent declarations that he had done so (218, 219); and as to the admissibility of these declarations, he holds that they are admitted to rebut the presumption of revocation when a will cannot be found, and says:

"The question is whether the declarations of the testator can be received as secondary evidence of the contents of the lost will. No doubt, generally speaking, where secondary evidence is admissible, if oral, it must be given on oath; if documentary, it must be verified on oath. Nevertheless, the declarations of deceased persons are in several instances admitted as exceptions to the general rule, where such persons have had peculiar means of knowledge and may be supposed to have been without motive to speak otherwise than according to the truth. It is obvious that a man who has made his will stands pre-eminently in that position.

He must be taken to know the contents of the instrument he has executed. If he speaks of its provisions he can have no motive for misrepresenting them, except in rare instances in which the testator may have the intention of misleading by his statements respecting his will. Generally speaking, statements of this kind are honestly made, and this class of evidence may be put on the same footing with the declarations of members of a family in matters of pedigree, evidence not always to be relied on, yet sufficiently so to make it worth admitting, leaving its effect to be judged of by those who have to decide the case.

"It is upon this principle, I presume, that the declarations of a deceased testator have in more than one instance been admitted as evidence. Thus, they have been admitted, as in Doe *vs.* Palmer, 16 Q. B., 747; 20 L. J. (Q. B.), 367, to negative the presumption arising from interlineations appearing on the face of a will, that such interlineations have been made subsequently to the execution of the will. In like manner the declarations of a testator have been admitted to show the continuing existence of the will at the time they were made, and so to rebut the presumption of the will having been destroyed *animo revocandi*, when the will, having remained in the custody of the testator, is no longer forthcoming. Thus, if a testator were to say, 'When I am dead you will find my will in such a place,' or, 'I have left my estate of Blackacre to my son John;' or, 'I have left £5,000 to my daughter Mary;' such, or similar declarations would be receivable in evidence to show that the will was, so far as was known to the testator, in existence at the time they were made" (224, 225).

He then proceeds to hold that such declarations are admissible evidence as to the contents of a lost will (225–229).

In a concurring opinion Jessell, M. R., holds that the presumption of revocation is overcome by the evidence. He says:

"I am satisfied that the testator in this case died under the belief that he had left behind him a will disposing, in a manner satisfactory to him, of his whole estate. Every act of his life which is proved, every statement made by him which is proved, in respect of his testamentary dispositions,

to my mind point to but one conclusion, and to arrive at a contrary conclusion would be to believe that Lord St. Leonards not only spoke a lie but acted a lie to the last moment of his existence."

He next considers the several exceptions to the rule against hearsay evidence and the grounds upon which those exceptions are based, and says that the reasons for the several exceptions all apply to the case before the court (241, 242).

James, L. J., and Baggallay, J. A., concur in Chief Justice Cockburn's opinion, the latter stating that he wishes particularly to express concurrence as to the admissibility of the declarations of the testator (247, 252).

Mellish, L. J., concurred in the result, but he expressed his doubts as to the subsequent declarations, and practically dissented as to their admissibility for the purpose of proving the contents of the will; but he proceeds to make a clear distinction between such declarations as showing a present intention and those which relate to and are offered as proof of past transactions. Thus, on page 251, he says:

"I think there is a most material distinction, as was pointed out by Lord Campbell in Doe *vs.* Palmer, 16 Q. B., 747; 20 L. J. (Q. B.), 367, between declarations made before a will is executed, and declarations made subsequently. The declarations which are made before the will are not, I apprehend, to be taken as evidence of the contents of the will which is subsequently made—they obviously do not prove it; *and wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were.* When a doubt is thrown on the correctness of evidence which has been given as to the contents of a will, the declarations of the testator as to what he intended to put in his will, made either contemporaneously with or prior to the execution of his will, are obviously evidence which may corroborate the other testimony as to what is contained in the will. But, to my mind, they do not of themselves prove

what were the contents of the will; they only corroborate the other evidence which has been given of the contents, because it is more probable that the testator has than that he has not made a particular devise, or a particular bequest, when he has told a person previously that he intended to make it, inasmuch as it shews that he had it in his mind to make such a will at the time he made that declaration. But a declaration after he has made his will, of what the contents of the will are, is not a statement of anything which is passing in his mind at the time; *it is simply a statement of a fact* within his knowledge, and therefore you cannot admit it unless you can bring it within some of the exceptions to the general rule that *hearsay evidence is not admissible to prove a fact which is stated in the declaration*" (p. 251).

Even this dissenting opinion, it will be seen, sustains our contention here. The declarations of Judge Holt, admitted in evidence, were admissible to show his intentions at the time they were made. They were not held to be competent for any other purpose.

In Gould *vs.* Lakes, L. R., 6 Probate Div., 1, which was decided in 1880, it was held that the declarations of a testator, oral and written, before and after the date of the instrument in controversy, that he intended to make his nephew his executor and residuary legatee, were competent evidence as tending to prove that a separate paper which purported to make the nephew executor and sole residuary legatee had been attached to the will by the testator with the intention of making it a part of his will. It was held that such declarations when made before the date of the will were admissible to show the intention to make the nephew executor and residuary legatee, and those made afterwards were competent to show his belief that he had carried that intention into effect.

In Southworth *vs.* Adams, 11 Bis., 256, a bill in equity had been filed under a statute of the State of Wisconsin to establish a lost will. It was held in that case that it is now settled law that the contents of a lost will may be proved by

the declarations of the testator made after the date of the will. The court reviews the cases at great length and shows that when a will is traced to the testator, and is not known to have passed out of his possession, it is presumed that he destroyed it, intending to revoke it, and that this presumption may be met by evidence to the contrary. It was held in this particular case that the presumption was overcome, the court laying great stress on a declaration made by the decedent on the day of his death that he had the will in his trunk.

The statute of Michigan relating to wills requires that the execution of a will before witnesses, and the other formalities required shall be "satisfactorily proved." Under this statute, in the case of Sullivan's Will (114 Mich., 189–193), it was held in a case in which the subscribing witnesses were all dead that the statute was complied with by evidence which included subsequent declarations of the testatrix. The last of these declarations was made shortly before the death of the testatrix and fourteen years after the date of the will, the court finding that these declarations indicated that the testatrix "understood what the paper was."

In the will of Cottrell, 95 N. Y., 329, the sole question was whether the will before the court was a forgery or genuine. There was an attestation clause in due form purporting to be signed by two witnesses, but they both testified that they had never witnessed the will, and that their signatures thereto were forgeries. The surrogate, nevertheless, held that there was evidence before him sufficient to overcome this testimony, and he admitted the will to probate. His judgment having been confirmed in the general term, the case was taken to the court of appeals. That court held that under the statutes governing the case it was confined to the question whether there was in the case competent evidence to sustain the judgment, and it held that there was such evidence, saying :

"The testator declared during his last sickness that the will, executed as he had described it, was either among his papers, or that he had given it to his executor."

In Burge *vs.* Hamilton, 72 Ga., 568, the will involved contained only ten pages, while the last page referred to it as containing pages numbered 1–11. In opposition to the will, it was contended that there was evidently a page missing, and that as the whole will was not before the court, it could not be admitted to probate. The court held that this difficulty could be explained and had been satisfactorily explained by evidence as to subsequent declarations of the testator, showing that the ten pages constituted the complete will. The court in its opinion, on pages 605–629, gives a long and able review of the cases in England and in Georgia bearing upon the question of the admissibility of subsequent declarations of a testator in analogous cases.

In Miller *vs.* Phillips, 9 R. I., 141, a will had been made by a single woman, who afterward married. By the law of Rhode Island the marriage raised a presumption that the will was revoked, but this presumption might be assailed or supported by evidence. The court held that the declarations of the testatrix made after she had married were competent and sufficient to show that her intention was that the will should stand. There seems never to have been any serious doubt that this is the law. (See Lugg *vs.* Lugg, 1 Ld. Ray, 441; Brady *vs.* Cubitt, 1 Doug., 31; Holloway *vs.* Clarke, 1 Phill., 399; Hall *vs.* Dench, 1 Vern. Ch., 329.)

On pages 124–147 of their brief counsel for the plaintiffs in error undertake to demonstrate that, in the appellate courts in seven out of eight States in which the question has arisen, a conclusion has been reached which is adverse to the ruling of the trial judge in this case, and the opinion of the court of appeals sustaining that ruling, as to the ad-

missibility of subsequent declarations of a testator where the issue is forgery.

The first case, and the one which seems to be principally relied upon, is the case of Boylan *vs.* Meeker, 28 N. J. Law, 274, a case which was decided in 1860, and the report of it occupies about 200 pages of the volume in which it is found. It seems from the history of the litigation over the will which was involved in Boylan *vs.* Meeker, as given in 4 Dutch., 477, that the majority of the judges who from first to last sat in the various stages of the litigation (including Mr. Justice Grier, of this court, in Turner *vs.* Hand, 3 Wall., Jr., 88) held the declarations of the testator made after the date of the will to be admissible.

And notwithstanding the contention to the contrary in the opposing brief in this case, we insist that an examination of the case, as reported in 28 N. J. Law, will show that of the four judges who determined the case one certainly—Vredenburg, J.—not only held them admissible, but gave them great weight in deciding the case, and that apparently Green, Ch. J., concurred in this view. Even the opinion of Whelpley, J., is based upon grounds which have no application to the present case, for on page 302 of the report he says that the trial judge told the jury that the subsequent declarations of the testator were not in evidence to show the execution of the will directly, but were important in showing that the decedent had no knowledge of its existence; and this Judge Whelpley says was error because the declarations referred to *merely showed that the testator did not mention the will, and therefore did not tend to show either a want of knowledge or a want of recollection by him of the instrument or its contents.*

"These declarations," says he, "prove that he spoke on many different occasions, to different witnesses, without mentioning his will of January. *They did not tend to show want of knowledge or recollection of it.* It is presumed that evidence of the same kind might have been heaped up *ad nauseam*,

but the increase of its quantity would not have added to its strength. The evidence of forty witnesses proving that he spoke without mentioning the will, would not come any nearer proving the proposition than that of one. A million of zeros added together are but zero, yet witnesses should not be convicted of perjury by showing that their testimony is in a high degree improbable.

"Hume did not disprove the miracles of the New Testament by showing that positive testimony in their favor was in the highest degree improbable. The testimony of four concurring witnesses unimpeached, of good character, having no interest in the case, ought not to be disregarded upon proof of the simple improbability of their story."

Indeed it is impossible to read any of the opinions in Boylan *vs.* Meeker without seeing that the conclusion reached was due almost altogether to the fact that the execution of the will in that case was proved by the testimony of so many-eye witnesses who were manifestly telling the truth that circumstantial evidence could not possibly overcome it.

Anticipating that we will claim that Boylan *vs.* Meeker does not sustain their contention, counsel refer to a later case in New Jersey—Gordon's case, 50 N. J. Eq., 397—as showing that it has since been held in New Jersey on the authority of Boylan *vs.* Meeker that the subsequent declarations of the testator are inadmissible where the issue is as to the execution of the will. That case was heard before the chancellor of the State, sitting as "ordinary," and was decided in 1892. Unfortunately for this claim, in 1897 there came before the same chancellor, still sitting as "ordinary," the case of Davis *vs.* Elliott, 55 N. J. Eq., 473—a case in which the sole question was as to the forgery of the will in controversy. The case was originally heard in the orphans' court of Camden county, where two out of three judges held the will to be a forgery, notwithstanding the fact that two subscribing witnesses testified to the execution of the will in their presence, the theory

of the contestants being that the subscribing witnesses had themselves forged the will and were endeavoring to make that crime effective by committing the additional offense of perjury. The will excluded the son of the testatrix. The trial court received and considered evidence as to the testatrix' relations with her son before the date of the will and from that time down to the hour of her death. Subsequent declarations of the testatrix were also introduced and considered—some in favor of the will and some against it. The "ordinary" reversed the judgment below, giving great weight to the fact that it was shown that the testatrix before the date of the will had declared that she was going to have one of the witnesses in question write it for her. As to the subsequent declarations, he says:

"Moreover it is shown by other entirely disinterested witnesses that after the date of the will, Mrs. Elliott declared that she had made a will."

The second of the eight cases is Johnson *vs.* Hicks, 1 Lansing (N. Y.), 150. That case was heard in the supreme court in general term for the eighth district of New York, before judges Marvin, Lamont, and Barker. There were two subscribing witnesses in that case, one of whom was dead, and the other testified to the due execution of the will. Each side introduced opinions of witnesses as to the genuineness of the signature of the testator, as well as that of the deceased witness.

The caveators offered to prove at the trial the declaration of the testator *before* the date of the will that he intended to give his property to the legatees, and that *after* the date of the will he declared he had made such a will, and who the witnesses were, and that the will was in the upper town of Lockport. The trial judge excluded this evidence as hearsay, and the Supreme Court sustained this ruling, saying:

"This is clearly and admittedly hearsay, unless it falls within some of the exceptions."

No suggestion appears to have been made in the case that the evidence might have been competent for the purpose of showing the testamentary intentions of the testator at the time the declarations were made. It will be seen, too, that the subsequent declarations did not mention any of the beneficiaries, but were naked statements by the testator that he had made a will; that certain persons had witnessed it, and that it was in a certain location. Evidently the whole argument which was made in support of the declaration was that it was competent to prove by such a declaration the fact of execution. In this case the declarations were not introduced for any such purpose. They referred to individuals, and were competent for the purpose of showing what were the feelings of the testator toward those persons at the time they were made, and were competent also for the purpose of showing the intentions of the testator at the same time.

The court, in Lansing *vs.* Hicks, held, it will be seen, that declarations before the date of the will were incompetent. That such declarations are admissible was not denied at the trial of this case. The case is at variance with the later cases in the same State. (See the foregoing pages of this brief, and see, too, *In re* Hesdra, 119 N. Y., 615.)

The third of the eight cases is Hayes *vs.* West, 37 Ind., 21. This was not a case of forgery at all. The caveator admitted that the testator signed the will, and the objection to it was that the formalities required by the law were not complied with in regard to the execution of the instrument. There were also issues as to undue influence and mental capacity. The jury found, in substance, that the formalities of the law were not complied with; that the testator was of sound mind; and that the will was the result of undue influence. The only declarations of the testator involved in the case

were those which he made *before* the date of the will. They were that he was satisfied with the laws of descent and distribution, and did not intend to make any will. He did not in the declarations refer to any person. The trial judge held these declarations admissible on the issues of insanity and undue influence, but not admissible on the question of proving or disproving the execution of the will. The supreme court reversed the judgment against the will, holding that the declarations were not admissible on the issue of undue influence, the court saying:

"The making of a will after the making of such statements certainly indicates a change of mind on the part of the testator. But does such change of mind carry with it any inference whatever that the change has been effected by undue influence? We think not. * * * Without change little progress would be made in civilization."

So it will be seen that this case holds incompetent declarations which in the case at bar were admitted at the trial by all parties to be competent evidence. It will also be observed that whether these declarations were competent on the question of forgery was not before the supreme court at all, the trial judge having excluded the evidence on that issue and the party offering it having obtained a verdict in his favor. An examination of the opinion will further show that, as in most of the earlier cases on this subject, counsel who offered the declarations failed to direct the attention of the court to the question whether they were admissible for the purpose of showing the feelings and intentions of the testator at the time they were made.

In the fourth case of McDonald *vs.* McDonald, 142 Ind., 55, there were several issues, one being forgery. The contestants admitted that the testator executed a will at the time and place and before the witnesses claimed by the proponent, but charged that that will had been destroyed or concealed by Mrs. McDonald, and that the will in contro-

versy had been forged and substituted for it. The contestants appeared in the case as devisees under the first will.

The contestants were permitted to prove the contents of the lost will by the subsequent declarations of the testator. That such declarations are admissible for that purpose the court held was supported by a multitude of authorities. (See pages 79–84 of the report.)

The court remarks incidentally, at page 81:

"It is settled in this State that the declarations of a testator, made at a time other than when the will was executed, are not admissible in an action of contest upon the issue of fraud or undue influence (Runkle *vs.* Gates, 11 Ind., 95; Hayes *vs.* West, 37 Ind., 21)."

The declarations in the McDonald case were that the testator had given his widow a life estate in certain property. The missing will gave her such life estate, while the will which she propounded gave her a fee in the same property. The trial judge instructed the jury that the declarations as to the contents of the lost will were not to be considered in support of the other charges and issues in the case. The proponent requested a similar instruction, which was refused, and it was held that the instruction which was granted covered the ground satisfactorily. (See pages 85, 86.) So far as can be gathered from the report of the case, there was no discussion, either in the trial court or in the supreme court, as to the admissibility of such a declaration to show the feelings and intentions of the testator toward his wife at the time the declarations were made.

The fifth case is Johnson *vs.* Brown, 51 Texas, 65, which is discussed on page 49 of this brief. It holds subsequent declarations of a testator in the trial of the issue of forgery to be admissible for the purposes stated in the opinion. But counsel contend that the same court that decided that case six years later overruled it in Kennedy *vs.* Upshaw, 64 Texas, 411. In the latter case the sole question was as to the forgery

of a codicil to a will. The declarations admitted were made three days after the date of the codicil. The testator was asked if he had made any change in his will, and answered that he had not made such change and was not going to make any. It was held that these declarations were not admissible in evidence. Johnson *vs.* Brown was cited by counsel on each side of the case, but is not referred to in the opinion of the court.

We submit that these two cases, instead of being inconsistent with each other, furnish an excellent illustration of the distinction which was made at the trial of this case in reference to the purposes for which such declarations are admitted. The declarations in Johnson *vs.* Brown showed a strong feeling of hostility on the part of the testator toward the persons mentioned as legatees in the alleged will both before and after its date. The declarations in Kennedy *vs.* Upshaw refer to no person whatever, and do not directly or indirectly tend to show what were the testator's feelings or intentions toward any person named in the will or excluded by it. We have seen that the declarations in Kennedy *vs.* Upshaw were admitted for the purpose of showing the intentions and purposes of the testator at the time they were made.

It is clear that the reason Johnson *vs.* Brown is not referred to in Kennedy *vs.* Upshaw is that the two cases involve such different questions that the earlier one had no bearing upon the later decision.

In the present case no such declarations as those which were involved in Kennedy *vs.* Upshaw were offered in evidence.

The sixth case is Walton *vs.* Kendrick, 122 Mo., 504. In that case the sole question was forgery and the verdict was in favor of the will. The declaration that was relied upon was proved only by the testimony of the widow, who was the propounder of the will and the principal beneficiary under it. It was a declaration which, she testified, had been

made to her after the date of the will, and was in substance that the testator had told his daughter Katy to sign the will for him, and that he had seen her do it. The contestants, as to this evidence, asked the court to instruct the jury as follows:

"The court instructs the jury that the testimony of Mrs. Sarah Kendrick, contained in her deposition read in evidence, should not be considered by you *for any other purpose than to show the mental condition and state of the affections of John W. Price*, and that the said testimony is not competent for the purpose of proving that the said John W. Price executed the paper propounded as his will."

The trial judge refused to grant this instruction. There are several concurring opinions in the supreme court, and in one only (that of Brace, J.) is this question referred to. He holds that the ruling of the court below was erroneous, because he says such declarations are mere hearsay, "*so far as they are relied upon to furnish evidence of the facts they contain.*" This case therefore sustains our contention that these declarations are admissible, so far as they indicate the feelings, intentions, and purposes of the testator when he makes them.

The main question in the above case was whether there was sufficient evidence that the testator's daughter Katy signed her father's name *in his presence.* Of the seven judges in the case all but one concurred in holding that the declaration of the testator to the subscribing witnesses that it was his will and that he had had it written by his daughter was sufficient evidence from which the jury might infer that his name *was* signed by his daughter in his presence. This case, so much relied upon by our opponents in the present case, therefore, is as strong as any case to be found against their contention, because it holds that the declaration of the testator that he had at some time previously had the will written by somebody else, and that his signature had been affixed by another at his request, was competent as

evidence tending to establish those facts, and that such declaration also justified the inference that the thing he had merely said was done had been done in the manner required by law to make the will a valid instrument.

The seventh case is Leslie *vs.* McMurthy, 60 Ark., 301. In that case the sole question was forgery, and there was a verdict sustaining the will. But one question of law was presented on appeal, and that was whether the testator's declarations a year after the date of the instrument to the effect that he had made no will were admissible. It was held that the trial judge was right in excluding the declarations. From the very brief opinion in the case it is evident that the only question considered was whether the declarations were admissible as proving the truth of the testator's statement. The declarations referred to no person, and could not in any possible manner show what his feelings were either toward those who were excluded by the will or the beneficiaries under it. The court does not consider at all whether the declarations were competent for the purpose of showing the testamentary intentions of the testator at the time they were made.

The eighth and last case is Swope *vs.* Donnelly, 190 Pa. St., 417. There, too, the sole question was whether the will was a forgery. A verdict was rendered sustaining the will. The only declarations of the testatrix which were proved at the trial were one, made about two months *before* the date of the will, to the effect that she had a will in her possession giving her husband only what the law allowed him, and the other, made five years *before*, that she would not leave her money to her husband, and that she wanted her money to go to her own people. The counsel for the appellants in that case claimed only that the declarations were not admissible as evidence of the facts stated. (See p. 419 of the report.) The court in its opinion makes the same distinction, citing, with approval, Herster *vs.* Herster, 122 Pa. St., 239; Turner *vs.* Hand, 3 Wall., Jr., 88; Johnson *vs.*

Brown, 51 Texas, 65; Hoppe *vs.* Beyers, 60 Md., 381, and Taylor Will Case, 10 Abb. Pr. (N. S.), 300, in all of which cases it was held that such declarations are admissible for the purpose of showing the feelings and intentions of the testator at the time. It is quite evident from the whole opinion in Swope *vs.* Donnelly that the court was chiefly influenced by the fact that the declarations relied upon in that case were so few and, in part, so remote that they could not reasonably form the basis of a verdict in favor of the will.

In the case at bar the counsel for the caveatees at the trial conceded that declarations made before the date of the will were competent.

We cannot follow the details of the other cases mentioned in the brief for the plaintiffs in error bearing upon their objection to the declarations of Judge Holt as evidence on the issue of forgery. Several of them go much further than the trial judge went in this case; for example, Reel *vs.* Reel, 1 Hawks, 248, and Beadles *vs.* Alexander, 9 Baxter, 604.

The Taylor will case, 10 Abb. Pr., N. S., 300, is a decision by the surrogate, but it aptly represents the distinction which runs through all the well-considered cases on this subject and which we have endeavored to make clear. In Waterman *vs.* Whitney, 1 Kern., 157, all that the court actually decided was that declarations which were excluded at the trial should have been admitted; but even the *dictum* of the court in that case goes only to the point that declarations of a deceased person are not ordinarily competent evidence to prove anything but his mental condition or feelings at the time they are made. In that case the court says certain declarations are admissible when the issue is mental capacity or undue influence, but are not proper evidence when the issue is fraud to prove the fact of fraud.

In a later case, in Maryland (Griffith *vs.* Diffenderfer, 50 Md., 466), the court of appeals of that State held such declarations admissible in a case in which the sole issue left

standing was fraud, and referred to Waterman *vs.* Whitney as a case sustaining that conclusion.

Shailer *vs.* Bumstead, 99 Mass., 112, and Marx *vs.* McGlynn, 88 N. Y., 357, are leading cases in the same direction.

Dinges *vs.* Branson, 14 W. Va., 100, contains an exceedingly full and able discussion of the question. The court says (119, 120) that the fact that the declarations were made thirty years before or thirty years after the date of the will may not be too remote; that everything depends on the facts of the particular case.

There are many striking analogies favorable to the admission of such declarations, as on the question of the ademption of legacies (1 Red. on Wills, 540); when it is uncertain which of two or more persons of the same name the testator intended to benefit (*id.*, 560, 561); and in the case of a will executed by a blind person, when it is uncertain whether the testator knew what he was signing (*id.*, 567).

II.

REVOCATION.

It seems to us that on the issue of revocation there is nothing now for this court to decide. The jury having found the will to be a forgery, the issue as to revocation was out of the case, and their verdict on that issue was worded accordingly.

The suggestion that if this court should grant a new trial it should direct that the evidence be confined to the question of forgery, because the issue of revocation has been settled in favor of the caveatees, does not seem to us to call for any argument in reply.

Nor do we assent to the proposition that even if this court should affirm the judgment below the same questions may have to be fought over again between the same parties in a

suit involving the real estate. There are two reasons for this. In the first place, this paper can never go to a jury as a will of real estate, because there is no testamentary clause, and proof of the required formalities must fail; and, in the second place, the fact of forgery established by the verdict in this case, on principles too well settled in this court to require citation, would be *res judicata* in *any* other proceeding between the same parties, and it happens that in this case Joseph Holt's heirs and the distributees of his personal estate are the same persons.

For these reasons and because to our minds the observations which apply to the rulings of the trial judge bearing upon the issue of forgery must govern that part of the case which relates to the issue of revocation, we shall devote but little space to this branch of the argument.

We hold it to be well settled that—

After the death of a testator circumstantial evidence is admissible to show that any burning or mutilation of his will was done by him.

Our opponents do not, in so many words, dispute this proposition, but their arguments as to evidence of revocation leads necessarily to the conclusion that this is one question of fact as to which circumstantial evidence is to be altogether excluded.

They admit that the surrounding circumstances, including the purposes and beliefs of the testator, as manifested by his subsequent declarations, may be taken into consideration in determining the intent with which the burning or mutilation was done when it has once been shown that it was done by him; but, as we understand them, they think that that can be proved only by eye witnesses. They concede, as on all the authorities they are obliged to concede, that the condition of this paper "is sufficient for its effectual revocation so far as mere physical defacement is concerned," and that "if done by Judge Holt or any one else by

him authorized the presumtion of law that it was done with the intent to revoke would at once arise" (page 69, Brief for Plaintiffs in Error.)

Yet counsel, in support of their position here, cite numerous cases *in which the will was found intact* and in which the courts have held that where the will is not defaced at all declarations of the testator showing that he thought he had revoked it were not competent. So they cite other cases in which some attempt to revoke had been made which was insufficient in law to work a revocation, though done by the testator with intent to revoke. Clearly these citations are beside the mark in a case like this, where everybody admits that what was done was sufficient if it was done by the testator with the proper intent.

It is not disputed that ordinarily this question is determined in the first instance by a presumption. If the mutilated will is found among the effects of the testator or, if last traced to his possession, it has disappeared, two presumptions arise—one that he defaced or destroyed it, the other that he did so intending to revoke it. If, on the contrary, it is found in the possession of those who are interested adversely to it or is last traced to their possession and cannot be found, the presumption is that they defaced or destroyed it, and that they did so fraudulently.

There is still a third case—that is, the will is found torn in the hands of a disinterested third person. In that event, say counsel in their brief, it may be conceded for the purposes of the argument, "*the question might have been open, and no presumption either way would have attached*" (p. 81, Brief).

Finally, here we have a fourth case—nobody knows in whose possession the paper has ever been and nobody knows whence it came.

Now, in the first two situations the presumption of revocation, on the one hand, and of fraudulent mutilation or suppression, on the other, may always be rebutted or sup-

ported by circumstantial evidence, including the testamentary intentions and purposes of the testator shown by his declarations to the day of his death. This is not disputed. Why, then, should such evidence be excluded when the fact of the mutilation or disappearance of the will is before the court, but there is no presumption at all as to when, how, or by whom such mutilation or disappearance was brought about? It would seem that there is far greater reason for turning on the light when there is nothing on which to base even a presumption. The greater the darkness, the more the need of a lamp.

The importance of this consideration is manifest, for it is said on page 95 of the adverse brief that if there was any presumption in this case, "*much, perhaps most, of this evidence would have been admissible.*" They proceed to claim, however, that in the absence of evidence or presumption that Judge Holt defaced or burned this paper his declarations are inadmissible, because, they say, such declarations are competent only as throwing light on the intention with which the mutilation has been done after the fact of doing it has been otherwise established.

Yet we doubt whether in the multitude of cases to be found on this subject there is one which sustains this view of the matter. In the great majority of cases the question has been as to rebutting or supporting the presumption of mutilation or destruction by the testator, and in every such case we think it will be found that the circumstantial evidence, including declarations of the testator, has been addressed to the question whether he did in fact mutilate or destroy the paper, and not merely to the question with what intent he did such act. Most cases of this kind are settled as soon as it is known who is responsible for the mutilation or destruction of the paper. To illustrate this, we refer to a few of the leading cases on the subject.

In Lawyer *vs.* Smith, 8 Mich., 411, a will twenty-one years old was found, after the death of the testatrix, in a barrel

with a lot of waste paper. It was in several pieces when found. This instrument having been offered for probate, the contestants offered to prove declarations, oral and written, of the testatrix, made after its date, that she had destroyed it. This was excluded at the trial, and the trial justice also refused to let a witness answer the question whether the testatrix, after the making of the will, spoke of making any disposition of her property, and, if so, what she said. On appeal the supreme court of Michigan set aside a verdict in favor of the will, the court holding that the evidence which had been excluded was admissible as throwing light upon the question *whether the mutilation of the will was done by the testatrix*, and, if so, whether she did it by accident or design.

In Patterson *vs.* Hickey, 32 Ga., 156, the will in controversy was found with the testator's effects, but not among his important papers, and when found was torn into two pieces, but was otherwise perfect. The question was whether he tore it, and, if so, with what intent. At the trial the contestants of the will offered, and the court excluded, evidence tending to show that after the date of the will the testator had said that he "intended his children and grandchildren should share equally in his property," and that he had made other similar declarations. In a learned and exhaustive opinion the supreme court of Georgia held that this evidence was admissible, the justice who delivered the opinion closing his review of the case with these words: "I have not a scintilla of doubt resting in my mind that the testimony excluded should have been received by the circuit court."

In Harring *vs.* Allen, 25 Mich., 505 (1892), which was argued before Cooley, Graves, Christiancy, and Campbell, JJ., the question was whether a will which was shown to have been in the possession of the testator ten days before his death, but which could not be found after he died, was revoked. The admissibility of certain declarations of the testator being in question, the court say:

"There was, then, a question upon the truth of the statement, that decedent had destroyed the will, and also a question upon his intent to revoke. Now any declarations of decedent, adapted to disclose the state of his mind on the subject, would have borne upon the credit due to the statement, *that he tore the will*, and also upon his state of mind and intent in tearing the will, if he did tear it. Any free, intelligent and distinct expressions, manifesting approbation or disapprobation of the will, would have furnished more or less aid to the jury in their endeavors to ascertain, *whether in fact he did or did not tear the will*, and whether, if he did so, it was done with intent to revoke. For these purposes I think the inquiry was authorized. It is not pretended that any expressions of the kind in question could be used to establish specific facts embraced by the expressions. The point to which the evidence is referred, is the state and bearing of the testator's mind, whether favorable or unfavorable, to the will."

In Valentine's will, 93 Wis., 45, in which the question was as to the proof of a lost will, the court says, referring to evidence of subsequent declarations made by the testatrix as to whether she had destroyed the will:

"Where, as here, it is established that the testatrix properly executed a valid will, and the same was last known to be in her possession but cannot be found on her death, there is a *prima facie* presumption that she destroyed it with the intention of revoking it, but such presumption may be overcome by competent evidence, (*id.* [Cassoday, Wills], secs. 314–320, 356–367, and cases there cited). Of course, if such subsequent declarations are admissible in evidence to overcome such presumption, they are also admissible to support such presumption. True, upon the principles already stated in respect to admitting such declarations on the question of undue influence, her subsequent declarations to the effect that she had destroyed her will by burning the same, or by any of the other prescribed methods, would not be evidence of the fact so declared, much less, that such destruction was with the intent to revoke, *but they would tend to prove that she died in the belief that she had left no will, and thus support the pre-*

sumption of revocation arising from the fact that it was last known to be in her possession but could not be found upon her death."

It will be seen that the whole question in the above case was, *Who destroyed the will?* The declaration of the testatrix was not as to what her intention was in destroying the instrument, but as to whether she had destroyed it at all, and the opinion is another illustration of the principle hereinbefore applied to the evidence of such declarations where the issue is forgery that although they may expressly and directly refer to past transactions as to which they are hearsay, yet, since they show what the declarant thought and intended when he was speaking, they are nevertheless admissible for that purpose.

In Collier *vs.* Collier, 110 N. Y., 481, the will in question was made in 1863. The testatrix died in 1883, and the will, which gave the estate of the testatrix to the proponent, was last seen about seven months before the death of the testatrix. It could not be found after her death. The next of kin whose interests would have been adversely affected by the will were about the testatrix for a short time before her death, and were in the house where she died immediately afterward. It was held that the presumption was that the testatrix destroyed the will herself; that the burden was on the proponent to show that it was fraudulently destroyed by somebody else, and that it was not enough for the proponent to prove merely that the persons interested adversely to the will had had opportunities to destroy it. The proponent proved and the court considered declarations made by the testatrix during a period of nearly twenty years and up to about seven months before her death that she had made a will giving him all her property. The contestants proved and the court considered contrary declarations made by the testatrix up to a few days before her death. All these declarations were considered mainly on

the question whether the testatrix had destroyed the will. The court held that the proponent had not made out a *prima facie* case, and declined, therefore, to pass upon the competency of other evidence to which he had objected and which is not set forth in the report of the case.

In Tucker *vs.* Whitehead, 59 Miss., 594, the will was found in the testator's box where he kept his private papers. When found, which was after his death, the signature had been torn off. The heir whom the will injuriously affected had had access to the box, and the devisee named in the will charged that the will had been mutilated by the heir. The question was as to the competency of the testator's declarations bearing upon the issue of fact thus raised. The court said:

"Whatever may be the true rule where the act which the law accepts as itself evidence of a revocation is undoubtedly shown to have been done by the testator, we think it clear that testimony such as was offered here should always be received where, as in this case, it is uncertain whether the act was committed by the testator, or was the unauthorized or criminal act of a spoliator. The law makes the destruction or mutilation of a will by the testator sufficient evidence of a design to revoke it, and whether any declarations by him, other than those which accompany the act and thereby become a part of the *res gestæ*, should be receivable in evidence to contradict or explain the act, may well admit of doubt; but where the fact that he was the author of the destruction or mutilation is itself first presumed from the place where the paper is found, and upon this presumption there is built up the further presumption that it was done *animo revocandi*, it would seem that something more than presumptions should be let in. In such a case it is the part of wisdom to open the doors as wide as possible for the reception of every species of evidence at all calculated to advance the discovery of truth, since not to do so must in a great number of cases result in defeating the will of the deceased by accident or fraud. The evils which may spring from the introduction of parol proof in such a case are less than those which must be wrought by its exclusion. We append a few of the authorities permitting the introduction of the declarations

of the decedent in this class of cases, an examination of which will lead to those holding the opposite view. In the first case cited the argument on both sides is well summed up in the principal and in the dissenting opinions (Collagan *vs.* Burns, 57 Maine, 449; Lawyer *vs.* Smith, 8 Mich., 411; Weeks *vs.* McBeth, 14 Ala., 474; Patterson *vs.* Hickey, 32 Ga., 156; Steele *vs.* Price, 5 B. Mon., 58; Youndt *vs.* Youndt, 3 Grant's Cases (Penn.), 140; Tynan *vs.* Paschal, 27 Texas, 286)."

In a very recent case in the court of appeals of Virginia this question came up under novel circumstances. There was little doubt that the testator in that case had destroyed his will. The controversy was *whether he destroyed it before or after he became insane.*

While the court said that no objection had been made at the trial by either party to the declarations of the testator throwing light on the disputed issue of fact, and it was too late to raise the question of their admissibility in the appellate tribunal, it is quite evident that the court considered such evidence to be competent, for it treats some of the declarations as practically decisive of the case (Shacklett *vs.* Roller, 34 S. E. Rep., 492, Nov., 1899).

Other cases bearing directly on this point have been referred to in an earlier part of this brief. (See especially Collagan *vs.* Burns, 57 Me., 449; Sugden *vs.* Lord, St. Leonards, L. R. 1 P. D. (1876), 154; and Southworth *vs.* Adams, 11 Biss., 256.)

Such declarations were always received in the ecclesiastical courts in England. The probate jurisdiction of those courts was taken away by 20 and 21 Vict., ch. 77 (1 Wms. on Exers., *290). This is well illustrated by Hitchings *vs.* Wood, 2 Moore P. P. C., 355, to which counsel for the plaintiffs in error give so much space (See, as further indicating the liberality of the ecclesiastical courts in admitting this class of evidence, Loxley *vs.* Jackson, 3 Phill., 126, and Lillie *vs.* Lillie, 5 Eng. Ecc. Rep., 67.)

And since this jurisdiction was transferred to it the probate court in England has followed the same practice. (See Eckersley *vs.* Platt, L. R., 1 P. & D., 281, and Finch *vs.* Finch, L. R., 1 P. & D., 371.)

III.

THE COURT HAVING WITHDRAWN FROM THE JURY ALL OPINIONS AS TO THE GENUINENESS OF THE ALLEGED WILL, BASED EITHER WHOLLY OR IN PART UPON THE COMPOSITION OR STYLE OF THE PAPER, AND INSTRUCTED THEM TO DISREGARD IT, THE APPELLANTS HAVE NO JUST GROUND OF COMPLAINT, EVEN IF SUCH TESTIMONY WAS IMPROPERLY ADMITTED IN THE FIRST INSTANCE.

This court has several times held that where evidence has been improperly admitted against objection the error is cured by subsequently striking it out or instructing the jury to disregard it. In Penn Co. *vs.* Roy, 102 U. S., 458, the plaintiff, in an action against a railroad company for personal injuries, was allowed, against the objection of the defendant, to testify as to his poverty-stricken condition after being injured; but in instructing the jury the court told them not to take that evidence into consideration, and that the real question in the case was how much the plaintiff's ability to earn money in the future had been impaired. Mr. Justice Harlan, delivering the unanimous opinion of the court, said:

"Notwithstanding this emphatic direction that the jury should exclude from consideration any evidence in relation to the pecuniary condition of the plaintiff, the contention of the defendant is that the original error was not thereby cured, and that we should assume that the jury, disregarding the court's peremptory instructions, made the poverty of the plaintiff an element in the assessment of damages; and this, although the record discloses nothing justifying the conclusion that the jury disobeyed the directions of the

court. To this position we cannot assent, although we are referred to some adjudged cases, which seem to announce the broad proposition that an error in the admission of evidence cannot afterward be corrected by instructions to the jury so as to cancel the exception taken to its admission; but such a rule would be exceedingly inconvenient in practice and would often seriously obstruct the course of business in the courts. It cannot be sustained upon principle or by sound reason and is against the great weight of authority. The charge from the court that the jury should not consider evidence which had been improperly admitted was equivalent to striking it out of the case. The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend or were too unmindful of their duty to respect instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence. Any other rule would make it necessary in every trial where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval."

In Hopt *vs.* Utah, 120 U. S., 438, a physician was allowed to testify in a capital case that a blow on the head of the deceased, in his opinion, came from the left. The defendant was a left-handed man. This evidence was subsequently stricken from the record on the motion of the prosecuting attorney and the jury instructed to disregard it. The defendant contended that it was error to admit the evidence, and that the error was not cured by the subsequent action of the court; but it was held, first, that the evidence was admissible, and, second, that even if it was not, the error was cured by the evidence being stricken out with the accompanying instruction.

Mr. Justice Field, in delivering the opinion, said:

"It is true, in some instances, there may be such strong impressions made upon the minds of a jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission; and in that case the original objection may avail on appeal or writ of error. But such instances are exceptional. The trial of a case is not to be suspended, the jury discharged, a new one summoned, and the evidence retaken when an error in the admission of testimony can be corrected by its withdrawal, with proper instructions from the court to disregard it. We think the present case one of that kind" (438).

In New York, &c., R. R. Co. *vs.* Madison, 123 U. S., 524, where the action was for personal injuries caused by defendant's defective road-bed, the plaintiff, over the defendant's exception, was allowed to prove that after the accident the road-bed was put in a safer condition by the defendant's agent; but in submitting the case to the jury the court instructed them not to consider this testimony. It was held this cured the error; that "the jury could not have been misled on the subject."

So in Tex. & Pac. R. Co. *vs.* Volk, 151 U. S., 73, 77, the action being for personal injuries, the plaintiff was allowed to prove, over the defendant's objection, that the defendant's engineer and fireman had been retained in the defendant's service after the accident, and that they had not even been reprimanded. This evidence was introduced in support of a claim for exemplary damages. Subsequently the court instructed the jury that exemplary damages could not be allowed in the case. Mr. Justice Gray, delivering the opinion of the court, said that the evidence in question "became immaterial" by the withdrawal from the consideration of the jury of a claim for exemplary damages, and he cited in support of this conclusion the above-mentioned cases in 102 U. S. and 123 U. S.

To the same effect are many cases decided by the Mary-

land court of appeals. In Boone *vs.* Purnell, 28 Md., 629, 630, hearsay evidence having been improperly admitted, it was subsequently withdrawn by consent of the court, the opposite party excepting both to the introduction of the evidence and to its withdrawal. The court said, "We cannot see that any harm resulted to the appellants."

In Providence Life Ins. Co. *vs.* Martin, 32 Md., 310, 316, 317, in a similar case, the court said:

"The question then is, can a party who has offered testimony, oral or written, and induced the court to admit it against the objection of the opposite party, afterwards and before instructions are asked for and before the case has been argued by counsel, on discovering the supposed error into which he and the court had fallen, ask to have the same withdrawn from the jury, and is there any error in the court's action of which the opposite party has the right to complain in allowing and directing its withdrawal? In our opinion there is none, and the case falls directly within the decision in Boone *vs.* Purnell."

To the same effect are Sittig *vs.* Birkestack, 38 Md., 160, 161, and Herrick *vs.* Swomley, 56 Md., 464.

The rule thus laid down and constantly followed by this court and by the court of appeals of Maryland seems to be universal in this country. Some of the earlier cases in New York are apparently opposed to this view; but in Board of Water Commissioners of Detroit *vs.* Burr, 56 N. Y., 605, it was held that an error in admitting improper evidence was cured by the court telling the jury to disregard it; and in Gall *vs.* Gall, 114 N. Y., 109, 121, where evidence which had been received under objection and exception was struck out by the presiding judge on his own motion, it was held that this cured the error. The court said:

"Even when great care is used upon a trial, incompetent evidence will occasionally creep in. A witness may make a voluntary statement or an answer that is not responsive, or the trial judge may admit something the exact bearing of which he fails at the moment to perceive. Cannot this be

remedied by striking it out? Must the court stop in the midst of a long trial and discharge the jury because it is possible that the jurors, in violation of their duty, may give heed to evidence which is no longer in the case, but which was promptly struck out in their presence? Such a rule would seriously impede public business and lead to needless multiplication of trials. It would be opposed to the modern tendency both of legislation and judicial decisions."

All the cases cited by adverse counsel on this point are New York cases prior to the case last referred to.

In the case of Coughlin *vs.* Poulson, 2d MacArthur, 308, it was held that an error in admitting incompetent evidence was cured by the presiding judge instructing the jury to disregard it. In discussing the question, Mr. Justice Olin (himself an able New York lawyer), referring to the authorities which had been cited in favor of the appellant in that case, said: "I cannot but observe that all the adjudged cases cited in the argument upon this question were from the State of New York." He holds that even the New York cases as they then stood [before Gall *vs.* Gall was decided] established the doctrine that the withdrawal of evidence cures any error in admitting it.

It will be found on examination of the cases above relied upon by us that in all of them the evidence which was first admitted and then withdrawn was much more dangerous to the opposite party than the evidence which was withdrawn from the jury in the present case.

It may not be improper for counsel for the caveators to state why it was that after offering this class of evidence in the beginning of the trial they, toward the close of the case, requested the court to instruct the jury to disregard it. The difficulty which the case presented to the caveators at the outset is quite apparent. They were confronted with a document which several witnesses familiar with the handwriting of Joseph Holt testified was, in their opinion, genuine. There was no one who was willing to admit

that he knew anything about the paper from the time it was begotten until it reached the office of the register of wills. Able adverse counsel were contending that no evidence was competent upon the question of the genuineness of the paper which related to anything that happened after its date. If all such evidence had been excluded, there would have been left little but a controversy between experts and non-experts on each side as to handwriting. In this situation counsel for the caveators naturally felt it incumbent upon them to urge every piece of testimony which reasonably *might* be held competent evidence in their behalf. Upon careful reflection they reached the conclusion that the testimony of the kind under consideration was proper and competent evidence to go to the jury; that a man familiar with Judge Holt might well think that by the penmanship alone it looked like his handwriting, but from the language, style, and punctuation used be satisfied that he never wrote it, and yet be unable to convey to the minds of others the knowledge which convinced his own judgment. They therefore in good faith, and in the performance of a very responsible duty which they owed to their clients, argued and re-argued before the trial justice the question as to the admissibility of such testimony. The court, however, finally admitted all the evidence bearing upon the relations of Joseph Holt to the persons involved down to the date of his death. More important than all, the caveatees produced and put in evidence two letters from Joseph Holt to Major Throckmorton's wife, one bearing the same date as the alleged will, February 7, 1873, and the other dated September 29, 1873. Upon a comparison of these letters with the paper in dispute the counsel for the caveators became satisfied that it could be shown to a demonstration that the will was forged, and that it was forged by somebody who at the time had before him the two letters in question. They were satisfied also before the evidence was closed that they had demonstrated this fact to the satis-

faction of the court and the jury. They are prepared now to have those letters and the original will brought before this court, and to satisfy this court that the person who had those letters in his possession forged this will.

Following this came the disclosure that when Judge Holt died the Throckmorton family had in their possession a letter written by him on the 6th of February, 1873, from which it appeared that he intended on the following day to give a dinner party, and that he expected to have as guests at that dinner General Grant, Mrs. Grant, General Sherman, and Mrs. Sherman (117). Three of these four persons had long been dead and their names were attached to the alleged will. That they were selected because they were dead and because it could be thus shown that it was likely they were at Judge Holt's house on the day the paper was dated seemed a reasonable inference. It did not at all militate against this conclusion that when a careful examination of Judge Holt's memorandum books and papers was made it turned out that the dinner had been postponed till February 21, 1873 (117, 118), for that fact would not have been known to the forger.

Apparently to avoid the effect of these disclosures, Miss Throckmorton testified that the letters of February 6, February 7, and September 29, 1873, had been nailed up in a box in her closet for several years prior to the appearance of the alleged will (115). Finally the fact came out that Miss Throckmorton was in Washington for an hour on the 24th day of August, 1895, and that at that very hour the paper in controversy was deposited in a letter-box in that quarter of the city in which she then was (116, 119). The case then appeared to the counsel for the caveators to be too clear a one for their clients to permit them to longer run any risks as to evidence that might be at all doubtful. Under these changed circumstances they felt that it was no longer necessary for them to retain in the case evidence which had ceased to be

of any real consequence, and which, if they should obtain a verdict, might be used to have it set aside.

And why, after all, was this evidence not competent? Authorities on the direct point can hardly be looked for, because it is rarely, indeed, even in the case of forged wills, that the entire instrument purports to be in the handwriting of the testator. Usually only his signature is in question. Is not a man's manner of expressing himself as much a part of his identity as his face, or his voice, or his handwriting? Yet who can so describe the face, or the voice, or the handwriting of a friend as to enable others to identify him as well as he can himself? One of the most significant occurrences at the trial of this case occurred when Mr. Hitt was examined as a witness for the caveatees, and that was the emphasis which he laid upon the word *handwriting*, when he gave his opinion that this will is genuine (25, 26). It was quite evident that he was surprised to find Judge Holt's name at the foot of such a document, and that while the writing looked like Judge Holt's the contents of the paper raised a serious doubt in the mind of the witness as to whether Judge Holt ever wrote it. It is easy to see that the language of such a paper might render it certain that the man whose name is at the foot of it never composed it, and yet it might be utterly impossible to convey to the mind of the jury the reasons for such a conclusion. The Court of Appeals in this case declined to decide this question. It was not prepared to admit that opinions based on style and composition are not entitled to as much credit as those based on handwriting (160).

No opinions were offered in this case based upon style and composition alone. The few opinions which were not based on the handwriting alone were based on the handwriting and the composition taken together (41–43).

IV.

THERE WAS NO ERROR IN THE RULINGS OF THE COURT AS TO REBUTTAL EVIDENCE.

1. The evidence of P. Tecumseh Sherman was not competent in rebuttal, and the court properly excluded it.

This evidence was offered on the ground that it was in rebuttal of what John B. Randolph, as a witness for the caveators, had testified to in regard to a certain "quirl" and other characteristics in the genuine signature of General Sherman, as that signature had come under the observation of the witness as a clerk in the War Department. Mr. Randolph, of course, testified, as the record discloses, only from his own personal knowledge of General Sherman's signature. On his direct examination he had expressed the opinion that the signature of General Sherman to the paper in controversy was not genuine. On his cross-examination he had been asked his reasons for that opinion, and, among others, had stated that this flourish in the signature as it appeared on the paper in controversy was unlike the genuine signatures of General Sherman which he had seen; that "in four out of five of them the upper line in that upward stroke always touches the lower line" (85, 86).

It was attempted in rebuttal on this subject to show that it was not uncommon in the genuine signatures of General Sherman that this flourish should be made as it appears upon the disputed signature. We submit that this would not have been competent, even if the caveatees had offered to prove by the witness that from *his* observation of his father's genuine signatures he knew that this quirl was sometimes made as it is made in the disputed paper. That would not have contradicted Randolph, because he was speaking only of the signatures that he had seen. But no such offer was made. The offer

that was made was entirely consistent with the idea that the witness had been looking up his father's signatures and had found some in which this flourish was made as it is made in the disputed signature. But it needs no reference to authorities in this court to show that writings not in evidence in the case for some proper purpose cannot be offered or referred to as bearing upon the question of handwriting. If Mr. Sherman had produced a hundred documents bearing the genuine signature of his father, in which this flourish was made as it appeared on the paper in controversy, those papers would not have been admissible in evidence at any stage of the case. In rebuttal, as in their evidence-in-chief, the caveatees, like the caveators, could call witnesses to testify only as to their own personal knowledge on the subject of handwriting. If this witness in rebuttal had been asked whether he had any recollection as to how this particular flourish was made in the signatures of his father which had been made in his presence or in the course of correspondence with him, it is highly improbable that he could have answered the question in the affirmative. But no such question was asked him and no such proffer was made.

In the case of McDonald *vs.* McDonald, 142 Ind., 55, in which it was claimed that the signature of the alleged testator to the will was forged, a witness against the will testified that as far as his observation went the testator never wrote his signature without a break in the "onald." Thereupon the cross-examining counsel showed the witness a note and various checks of the testator, and, after the witness had examined them, asked him whether from his then present knowledge he would say that the testator wrote his signature without such breaks in the last letters of his name This question was objected to, and the answer was excluded at the trial on the ground that it would result in bringing in collateral papers as evidence as to handwriting. This ruling was held to be correct, the court saying (p. 71):

"For if the witness had stated that the signatures to the checks and note were not genuine, then, if appellants were entitled to use them for the purpose as insisted, surely they would have been entitled to controvert him by other evidence. And likewise, if he stated they were true signatures, to the appellees must be conceded the right to show the contrary, and hence at once the collateral inquiry would have arisen."

So in this case the proffer that was made was to show that the particular flourish in question "was by no means an unusual feature in the signature of General Sherman, and that it is frequently, if not habitually, found in his signature" (103). And as to the other peculiarities of the signature of General Sherman, concerning which his son was called in rebuttal, the offer was in substance the same (104). All these offers, as made, were based—or at least, so far as the court was informed, may have been based—upon particular signatures which the witness had discovered and which would have been inadmissible because they were collateral.

But, aside from this, if in every case where a question of handwriting is involved, the parties after having exhausted their own evidence upon the subject, are to be allowed, ostensibly in reply to the testimony of their adversaries, to call witnesses as to every variation in every letter testified to on cross-examination by such adverse witnesses, there would be no end to such a trial. If a party who calls a witness in such a case chooses to content himself with having the witness testify that he knows the handwriting of the party, and that the disputed signature is, in his opinion, genuine, nobody but himself is to blame if afterwards he finds out that it would have been better for him to go into particulars. When, for instance, Mr. Sherman was called in the first place as a witness to his father's signature, he could have been asked to give his reasons for saying that, in his opinion, the signature was genuine. If he, in fact,

remembered that this particular flourish was made in the disputed paper in the way in which his father ordinarily or sometimes made it, he could then have so testified. If, on the other hand, his recollection of the signature was general, so that he could not go into details about it, then palpably he could not give competent testimony on that point in rebuttal.

Necessarily, questions relating to the admissibility of evidence in rebuttal must be in some degree within the discretion of the trial court (Dugan *vs.* Anderson, 36 Md., 588). The cases cited by the caveatees upon this subject seem to us to have no bearing whatever upon the point involved here. A case analogous to the present situation is that of Brown *vs.* Ward, 53 Md., 376, 386 to 390. That was a contest as to the validity of a will in which the caveator, having offered evidence as to the unreasonable hostility of the decedent to his relatives and his belief in spiritualism, was held precluded from going into those subjects in rebuttal in reply to specific evidence on behalf of the caveatees.

2. The evidence of Martha Scott in surrebuttal was properly admitted.

Martha Scott was a servant in the house of Joseph Holt for many years immediately preceding his death. She had testified that she had not seen the caveatee, Miss Throckmorton, at the house with any other person. In rebuttal the caveatees had placed upon the stand one Anna Tulley, who testified that in 1891, on two different occasions, she had gone to Joseph Holt's house with Miss Throckmorton, and that on both of these occasions Martha Scott was present (88). Martha Scott being in the court-room at this time, and for the first time having seen this witness, the court allowed her to be recalled and to testify that she had never seen Anna Tulley at Joseph Holt's house (118, 119). Every one knows that a forgotten meeting may be recalled by the face and voice of the person met. It would have been fair ground of argu-

ment on behalf of the caveatees if the caveators had not recalled Martha Scott after she had heard the story of the witness whom she contradicted.

3. The court committed no error when it refused to allow the caveatees to examine John A. Bingham as a witness in rebuttal in order that he might express his opinion as to the genuineness of the handwriting of the instrument in controversy.

The caveatees went fully into the question of handwriting in their evidence in-chief (21, 23). When the caveatees, after examining a single witness as to the handwriting of the alleged testator, announced their case closed, the court ruled that it was incumbent upon them to offer all the evidence at that time that they proposed to offer upon the subject of the genuineness of the signature of Joseph Holt to the alleged will. Counsel for the caveatees accepted the ruling as being a matter within the discretion of the court. When Mr. Bingham was called in rebuttal the question that was asked him was as to whether the will was in Joseph Holt's handwriting (105). He was, it is true, asked as to his opinion, based upon the manner of composition as well as of handwriting, but the question was asked as to the handwriting and nothing else.

But it is unnecessary to pursue this matter further, for the reason that throughout the case the counsel for the caveatees contended that an opinion as to the handwriting of the paper, based in whole or in part upon its composition or style, was incompetent, and because of that objection, as has already been seen, all such evidence was finally withdrawn from the jury. There was therefore nothing to rebut.

V.

THE COURT PROPERLY ADMITTED IN EVIDENCE THE LETTER FROM JOSEPH HOLT TO MR. NICK RAY.

In relation to this matter, the learned counsel for the caveatees on page 93 of their brief fall into a singular error. They treat the letter of Joseph Holt of January 11, 1886, addressed to Mr. Ray, as though it stood by itself, whereas the importance of that piece of evidence depends upon its connection with another writing which was produced by the caveatees themselves and put in evidence by the caveators without any objection on the part of the caveatees.

Miss Hynes and Mrs. Ray had testified that in the spring of 1884 Joseph Holt gave to Miss Hynes $10,000 in District of Columbia 6 per cent. bonds (91, 94). Subsequently he conceived that he had been cheated by Mrs. Ray's husband in a financial transaction, and thereupon wrote to Mr. Ray the scorching letter in question. A copy of this letter in Joseph Holt's handwriting, which was offered in evidence, was found among his papers after his death, with endorsements, also in his handwriting, showing that the original of the letter had been mailed to Mr. Ray on January 11, 1886, and that no reply had been received. With this letter was also found Mr. Ray's note for $4,000 in favor of Joseph Holt, with endorsement in the latter's handwriting, showing that certain interest was due and unpaid, and that on the 25th of November, 1885, the original note had been sent by Holt to a lawyer in Lebanon, Kentucky, "for professional action." Counsel for the caveatees urge that there was no evidence that the original letter of January 11, 1886, had ever been received by Mr. Ray, overlooking the fact that the inquiry is as to Joseph Holt's feelings toward Mr. Ray, which are fully and emphatically manifested by the copy in his own handwriting of this letter, of which he retained possession until his death.

Mrs. Ray was a niece of Miss Hynes and one of her next of kin, so that if Miss Hynes should die intestate a part of her estate would go to Mrs. Ray, and thus practically to the benefit of the husband of Mrs. Ray.

On the cross examination of Miss Hynes she admitted that shortly prior to January 1, 1886, just about the time that Holt sent the note in question to a lawyer in Kentucky for collection, he, Holt, prepared for Miss Hynes, and she executed, a will, from which appeared two things of importance in this inquiry: (1) that Holt understood that the only property which Miss Hynes had, or was likely to have, were the $10,000 District of Columbia bonds in question; and (2) that Mrs. Ray was to be excluded from receiving any benefit from those bonds (93). Miss Hynes herself testified that she did not leave Mrs. Ray anything by that will "because said Joseph Holt wrote the will in that way" (93). Yet if, as the caveatees contend here, the will of February 7, 1873, was a genuine will and was then unrevoked, Joseph Holt left about $100,000 to go to Miss Hynes to do with as she pleased. Whoever reads the letter to Ray and Miss Hynes' account of the almost cotemporaneous communications between her and Holt about her will, and the will itself, can have no difficulty in determining the relevancy and the importance of the evidence. Certainly it was a fact which in the minds of some reasonable men might have had some weight in determining what were Judge Holt's testamentary intentions at that time toward Miss Hynes. It is not out of place here to quote the language of Mr. Justice Shepard in Olmstead *vs.* Webb, 5 App. Cas. D. C., 38, 49, which was referred to and approved in the subsequent case of Barbour *vs.* Moore, 10 App. Cas. D. C., 45:

"The remoteness in point of time is of little consequence compared with remoteness in point of causation, or relation to the question at issue. But some cases admit of and seem to require a wider range of evidence than others. Undue influence, coercion, fraud, and the like, naturally and ordi-

narily, are not susceptible of direct proof, but must be inferred from circumstances. Consequently, as has been well said, 'any fact, no matter how slight, bearing at all on the point at issue, and not wholly irrelevant, may be admitted. But the circumstances, when combined and considered by the jury, should be so strong as to satisfy them of the existence of the fact they are offered to establish' (Davis *vs.* Calvert, 5 G. & J., 269, 304). In a later case, wherein this doctrine is affirmed, the same court said: 'Undue influence is generally proved by a number of facts, each of which, standing alone, may be of little weight, but taken collectively may satisfy a rational mind of its existence' (Moore *vs.* McDonald, 68 Md., 321, 329). In such a case, too, much must be left to the sound discretion of the trial judge, who is called upon 'to discriminate between such facts as are merely collateral and foreign to the issue and such as are connected with it' (Davis *vs.* Calvert, *supra*)"

If this be the rule where undue influence or other fraud is charged, how much stronger is the case when a jury has to deal with a will bearing date more than twenty years before the testator's death, all the alleged witnesses to which are long dead, to which there is no attestation clause, and which, so far as the evidence discloses, was never seen by any one till it came to the court anonymously and covered with marks of suspicion?

It is to be observed here, too, that counsel for the caveatees overlook the fact that the evidence in question at their request was taken from the jury altogether, so far as any issue in the case was concerned, except the issue of revocation (125). As the jury never reached that issue, the evidence became wholly immaterial.

VI.

THE JUDGMENT APPEALED FROM SHOULD STAND, BECAUSE UPON THE WHOLE CASE THE PROBATE COURT SHOULD HAVE REFUSED TO ADMIT THE ALLEGED WILL TO PROBATE, AND THE JUSTICE PRESIDING AT THE TRIAL IN THE CIRCUIT COURT SHOULD HAVE REFUSED TO ADMIT IT IN EVIDENCE, OR SHOULD HAVE INSTRUCTED THE JURY AT THE CLOSE OF THE EVIDENCE TO RENDER A VERDICT IN FAVOR OF THE CAVEATORS.

We have now reached the question stated on page 4 of this brief which our opponents have not discussed at all, and which we think should control the case.

It is conceded by our adversaries (44, 50, 52 of their brief) that the ecclesiastical courts of England never allowed a will to go to probate when the only evidence connecting it with the testator was the opinions of witnesses as to the handwriting. They assume that this is a rule which will not obtain in a court governed by the rules of the common law.

This assumption is made without warrant. No case has yet been found, apparently, in which that question has arisen in a common-law court. The cases referred to on pages 34, 49, 51 of the brief for the caveatees, in which, as in the case at bar, the will came from an unknown source and was connected with the testator only by such opinions, were all cases in the ecclesiastical courts.

There is no question that of all kinds of evidence there is none more nearly worthless than opinions as to handwriting, either of experts or non-experts. In this case Hagan, one of the experts produced by the caveatees, testified that—

"A skilled expert could imitate the handwriting of another so that an ordinary observer could not detect the difference unless it was explained to him and shown to him

under a microscope, and that the science of forgery had got down so far that it takes an expert with his microscope to detect it when it is well done" (99).

When, therefore, a year after the death of a testator, a paper purporting to be his will, but dated more than twenty years before his death, comes to light under such circumstances as to make it impossible to trace it back a step further, and there is no evidence in its favor, *except* opinions as to handwriting, to allow it to go to probate would put the estate of every man at his death at the mercy of scoundrels who could forge wills and mail them anonymously without the slightest danger to themselves—wills so closely imitating the handwriting of the supposed testator that those who knew that handwriting best would be deceived by it. It would be necessary to imitate only the *signature* of the testator. In wills of personal property no witnesses are required in this jurisdiction. It can readily be seen that if this should be held allowable a new industry would spring up which would yield large and quick returns, with small labor and no risk.

But in this particular case the alleged will is burned and mutilated, and its seal, if it ever had one, has been removed. It is conceded by our opponents that if these defacements were the work of the supposed testator and were done by him with the intention of revoking the will they would be sufficient for that purpose; and it is everywhere laid down that if a will be found so burned and mutilated among the papers of the decedent a presumption arises that he himself did the act *animo revocandi*.

But here it is not known from what source the paper in dispute comes. Assuming it to have been once the will of Joseph Holt, no one gives any information tending to show whether it was mutilated while in his possession, or while in the possession of persons interested in its destruction, or while in the custody of disinterested persons.

We submit that in such a situation the proponents of the will must fail for two reasons. In the first place, they must make out at least a *prima facie* case, and this requires them to show not only that the paper was once the will of Judge Holt, but that it was such will when he died. Since as to the last proposition they have no evidence and are not helped out by any presumption, they are in the same position as any other plaintiff who has the burden of proof and fails to introduce sufficient evidence to make out a *prima facie* case.

In the second place, other things being equal, the law presumes innocence rather than guilt, and will therefore rather impute the burning and mutilation of this paper to Judge Holt than to another, for it would have been right for him to do it, but a gross fraud for anybody else to do it without his authority.

The presumption against guilt is not confined to criminal cases. Whenever a situation arises even in civil cases in which, owing to the absence of positive evidence, it is necessary to resort to presumptions, and there are but two possible presumptions, one involving wrong-doing and the other excluding it, the latter will be adopted (1 Greenl. on Ev., sections 34, 35 (note *a*), 38*a* (note 2), 41, 80; Best on Ev., section 302 (note V); Lawson on Presumptive Ev., 93, etc., ch. V).

In this case the will, assuming it to be genuine, is traced to the possession of the testator. Necessarily it was in his possession when he executed it. In the absence of evidence to the contrary it must be presumed that it remained in his possession till he died. Indeed, this was admitted by counsel for the caveatees during the trial. After the argument on the question of the admissibility of the testator's subsequent declarations, the court, in deciding the question, said:

"This situation is unique. It is conceded that the presumption is that the will was in the possession and custody

of the testator at the time of his death, but it is not conceded that at that time it was in its present condition" (33).

Therefore counsel for the caveatees, while contending that it is to be inferred that the will was in the possession of the testator at the time of his death, are asking the court to further infer that it was subsequently mutilated by somebody else. This involves a direct finding of fraud and crime. It is respectfully submitted that the presumption must be to the contrary.

In Bennett *vs.* Sherrod, 3 Iredell, L., 305, the court say:

"The authorities cited by the counsel for the appellant show that, where a will has been duly executed and left with the testator, if it be mutilated in his lifetime while in his possession, or upon his death, if it be found among his repositories canceled or defaced, in such cases, in the absence of other proof, the testator is presumed to have done the act, and the law further presumes that he did it *animo revocandi;* and if the repository of the will was at the same time accessible to the testator and another person and the mutilation was done in the lifetime of the testator, the law would presume that it was done by the testator. He had a right to do it, and a fraud will not be presumed in the other person."

So in Knapp *vs.* Knapp, 10 N. Y., 279, this language was used:

"It is true, as was contended by the counsel for the defendant, that it is a fact for the jury ultimately to pass upon and find whether the will is or is not shown to have been fraudulently destroyed, or rather this becomes ultimately a question for the jury in all cases where the party adduces sufficient evidence in the case to entitle him to go to the jury upon the question. If, on the contrary, the evidence so far fails to make out this fact that the court would feel itself constrained to set aside the verdict of the jury if they were to find the fact in favor of the party seeking to show the will fraudulently lost or destroyed, then the court upon

the trial may properly refuse to leave this question to the jury, and even do what was done by the learned justice upon the trial of this cause—arrest the trial at this point by refusing to permit the party to go into evidence to prove the will."

And in Bauskett *vs.* Keitt, 22 S. C., 193, the same doctrine is thus laid down:

"In this case there was no allegation or evidence tending to show that the will had been destroyed by accident, but the whole case of the plaintiffs depended upon their being able to show that the will was destroyed by the heirs-at-law because it was to their interest to do so. This would have been a criminal act on their part, and to establish it there must be evidence satisfactory to the tribunal (in this case the jury) entrusted with the trial of the issue. Indeed, the very ground upon which the rule is based—that where a will is traced to the possession of the testator, and it cannot be found after his death, the presumption is that the testator himself revoked it—is that the law will presume that an innocent rather than a criminal act has been done. Hence in such a case the law will presume that the will was destroyed by the testator, which would be an innocent act, rather than that it was destroyed by the heirs-at-law, even though they might have an interest so to do, and might by reason of their close relations to the testator have the best of opportunities of so doing, because if they did it their act would be a criminal one, which the law will not presume, but will require to be established by satisfactory evidence."

In the case of Scoggins *vs.* Turner, 98 N. C., 137, the supreme court of North Carolina expressly decided that where a stranger was shown to have had the same opportunity to take and destroy the will that the testator had, yet in the absence of any evidence the presumption in favor of innocence must govern and the will must fall.

In the great case of Colvin *vs.* Fraser, 2 Hagg., 140, 141, 143—a case which involved an estate of the value of nearly six hundred thousand pounds sterling, and which received

Lee McIntosh vs. Moore,
22 Tex. Civ. App. 57 (Oct. 1899)

a degree of consideration not exceeded in any other case to be found in the ecclesiastical reports—Sir John Nicoll expressly says that the reasen for assuming, in the absence of evidence, that a missing will was destroyed by the testator himself is that the court always presumes innocence rather than fraud.

Much is said by the counsel for the appellants about the danger to the community if the precedent be established that after men are dead their wills may be set aside by evidence of the character which was relied upon by the caveators in the present case; but far more dangerous to us all is the doctrine for which they contend, that when a document like this comes to the probate court secretly from some guilty hand after a man's death, bearing the names of witnesses long dead, never, so far as is known, having been seen by mortal eye from the day of its alleged execution until the day of its appearance—burned, mutilated, without seal, pasted together—it is to be presumed to express the wishes of the testator at the time of his death, and that that presumption cannot be met except by direct evidence of eye-witnesses that the mutilation was done by the testator.

Even on the first issue, as to the execution of the paper, it was, we submit, the duty of the court below to have refused the probate of this paper. There was no testamentary clause. Proof of the genuineness of the signatures of General Grant, General Sherman, and Mrs. Sherman did not therefore tend to prove the genuineness of the paper itself. There was nothing to indicate whether those names were placed on the paper before or after the signature "J. Holt" had been put there. The only evidence, therefore, that could be offered to the court in support of the document was that as to handwriting, and where there is any dispute about the handwriting, and there is no other evidence, a court of probate should not receive the document as a will.

In Machin *vs.* Grindon, 2 Lee's Eccl. R., 406, the court went further than this and refused to admit a codicil to probate in common form where the only evidence in support of the document was the testimony of the beneficiary and there were suspicious circumstances. In that case the testator had lodged in a room in Grindon's house, and Grindon testified he found the codicil in a bureau in that room, there being no evidence of the finding except Grindon's. After the death of the testator, Pickering, Grindon had procured a number of Pickering's letters, and "there was a great similitude between those letters and the codicil." Sir George Lee, the presiding judge, held that the circumstances indicated forgery; that, supposing there were no suspicion at all of any indirect practice, there was not evidence enough before the court to establish the paper, "for it stood solely upon a doubtful proof of handwriting, the most uncertain species of proof;" and he added:

"The court had never established a paper not found in the deceased person's custody nor supported by any circumstance upon a controverted evidence of handwriting, and in this case the evidence that it was not Mr. Pickering's handwriting is as strong as the evidence that it was."

A case much resembling the one at bar is that of *in re* last will of Solomon Sublette, an unreported case in the probate court at St. Louis, Missouri. Sublette died in 1857, and, no will appearing, his estate was settled up by an administrator, the administration being finally closed in April, 1866. Nearly thirty years afterwards a certain Mrs. Ewait presented for probate a paper purporting to be a will made by Sublette, dated April 15, 1856, which had come to her (or her attorneys) by mail from an unknown source on or about March 6, 1895, the will being in Mrs. Ewait's favor. In support of the paper some evidence was offered as to the genuineness of the signature of the testator. The court re-

fused to admit the paper to probate, and in so doing delivered a written opinion. The following are quotations from it:

"Who was the custodian during these many years when the law required the production of the paper if a genuine will? What was the reason for withholding the same from probate when the death became known shortly after the date of the will? If genuine, duty under the law required its production.

"If fictitious, the danger of detection in the perpetration of a great fraud was manifestly greater shortly after the death than it is now, when nearly two score years have removed many, if not all, those who could have testified against the fraud. If the custody was a proper one, why should the custodian conceal himself? These questions, which are suggested by the appearance of this paper at that time in the manner in which it came to light, lead me not only to the conclusion that it does not come from such custody as to afford a reasonable presumption in favor of its genuineness, but, *on the contrary, it raises a strong presumption that the paper was not genuine*, and that it is subject to just grounds of suspicion."

So we contend that in this case that if this paper had been offered for probate in common form and no one had appeared against it, it would have been the duty of the probate court to refuse to admit it to probate. It has been the rule of that court time out of mind to require in every case satisfactory evidence of the genuineness and due execution of a will before admitting it to probate, whether there is any opposition to it or not. Usually that satisfactory evidence is found in the testimony of the subscribing witnesses or some of them, or where they are dead and there is an attestation clause in evidence as to their signatures.

But here no such evidence was possible, and the date of the paper, its burned and torn condition, the apparent removal of its seal, the careful pasting together of its severed or almost severed parts, and the mysterious way in which it

reached the court, all pointed so strongly to fraud or crime in connection with it that it would have been the duty of the court to require explanation from those who attempted to use it without even the formality of calling on those whose birthright it would take away.

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